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IN THE

Supreme Court of the United States

October Term, 1962.
No. 542

WESTERN AIR LINES, INC.,

Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District.

HUGH W. DARLING,
DONALD K. HALL,
523 West Sixth St., Suite 737,
Los Angeles 14, California,
Attorneys for Petitioner.

Of Counsel:
DARLING, SHATTUCK, HALL & CALL,
523 West Sixth St., Suite 737,
Los Angeles 14, California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District.

To the Honorable, the Chief Justice of The United States and the Associate Justices of the Supreme Court of The United States:

Petitioner, Western Air Lines, Inc., prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, First Appellate District, affirming the judgment of the Superior Court of the State of California in and for the City and County of San Francisco in the above case.

Opinions Below.

The memorandum opinion of the Superior Court is unreported and is printed in the Appendix at pages 60-72. The opinion of the District Court of Appeal, printed in the Appendix at pages 1-59, is reported in 204 A. C. A. 137, 22 Cal. Rptr. 216.

Jurisdiction.

The judgment of the District Court of Appeal was filed on May 28, 1962. Rehearing was denied on June 18, 1962. A timely petition for hearing by the Supreme Court of the State of California was denied on July 25, 1962.[1] The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

Questions Presented.

This case concerns rates charged petitioner at the San Francisco International Airport which it alleges were unjustly discriminatory in violation of the Federal Airport Act, 49 U. S. C. §§ 1101 *et seq.*, and respondent's agreements with the United States given to secure the substantial Federal aid which has gone into development of the Airport. The District Court of Appeal construed the Act and the agreements as not vest-

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[1]Exercise of jurisdiction by the California Supreme Court is discretionary. *People v. Davis*, 147 Cal. 346, 81 Pac. 718. The Supreme Court's denial of a hearing in this case made the District Court of Appeal the highest court in California in which a decision could be had. *American Railway Express Company v. Levee*, 263 U. S. 19, 20-21; *Hammerstein v. Superior Court*, 341 U. S. 491, 492; *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 160. The time for applying to this Court runs from the date of the Supreme Court's denial of the petition for hearing. *American Railway Express Company v. Levee*, 263 U. S. 19, 21.

ing petitioner with any rights. The questions presented are:

1. Does petitioner air carrier have an actionable private right to use the Airport free from unjust discrimination, under or by virtue of Section 11 of the Federal Airport Act, 49 U. S. C. § 1110, or any of respondent's agreements with the United States?

2. If so, were the subject rates unjustly discriminatory within the meaning of that term as used in the Federal Airport Act and in respondent's agreements with the United States?

Statute Involved.

Section 11 of the Federal Airport Act, 60 Stat. 170, 49 U. S. C. § 1110, in its pertinent portions provides:

> "As a condition precedent to his approval of a project under this Act, the Administrator shall receive assurances in writing, satisfactory to him, that—
>
> (1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination;
>
> * * * * *
>
> To insure compliance with this section, the Administrator shall prescribe such project sponsorship requirements, consistent with the terms of this Act, as he may deem necessary. Among other steps to insure such compliance the Administrator is authorized to enter into contracts with public agencies, on behalf of the United States."

Statement.

A. Respondent's Agreements With the United States.

Substantial defense funds were expended on improvements at the Airport during World War II under the AP-4 Airport Project Program administered by the Administrator of Civil Aeronautics and as the agreed consideration for the United States' condemnation of Treasure Island.[2] In connection therewith respondent was required to, and on January 12, 1942, March 1, 1944, March 15, 1944, and June 5, 1944, through its Public Utilities Commission did, enter into agreements with the United States in which respondent covenanted, among other things, to operate the Airport at all times during the useful life of the improvements:

> ". . . for the use and benefit of the public, on reasonable terms and without unjust discrimination, . . ."

In 1948 and each of the succeeding years up to the time of trial of this case in 1958, respondent received grants of Federal funds pursuant to the Federal Airport Act for projects at the Airport. As required by the Act and prescribed in the regulations of the Administrator of Civil Aeronautics, 14 CFR Part 550, respondent in each of its eleven applications for such aid

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[2]Prior to the war substantial W. P. A. funds had been expended in improving the Airport. In 1937 complying with a request from the Bureau of Air Commerce, the agency then charged with administering W. P. A. airport projects, respondent's Public Utilities Commission passed this resolution:

> "Be It Resolved, That the Public Utilities Commission of the City and County of San Francisco hereby declares as its policy that said airport will at all times be operated and maintained as a municipal airport for the public benefit, without unjust discrimination against or in favor of any aircraft operator, including any scheduled airline operator."

covenanted, among other things, to operate the Airport at all times during the useful life of the improvements:

> ". . . for the use and benefit of the public, on fair and reasonable terms and without unjust discrimination."[3]

B. Facts Basing Petitioner's Claim.

Petitioner commenced operations at the Airport on May 1, 1944, in compliance with the certificate granted it in the *Additional North-South California Services Case*, 4 C. A. B. 373. The only other air carriers then operating at the Airport were United Air Lines and Trans World Airlines. Both had 20-year "integrated" leases (entered into with respondent in 1940 and 1942, respectively) covering their exclusive occupancies at the Airport and granting them the right to use the common facilities at specified rates.[4] Petitioner was

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[3]The Administrator of Civil Aeronautics' initial regulations under the Federal Airport Act prescribed a separate Sponsor's Assurance Agreement to be filed with the Project Application. 12 F. R. 143. Both were incorporated in and made a part of the Grant Agreement by reference. 12 F. R. 5552. Later the separate Sponsor's Assurance Agreement was dispensed with by including the required assurances in the prescribed form of Project Application. 13 F. R. 1404; 14 F. R. 2409; 14 CFR (1949 ed.) § 550.11, p. 141. The separate Sponsor's Assurance Agreement executed by respondent in 1948 prior to the change in the forms contained in addition this covenant:

> ". . . sponsor will permit all qualified operators, on reasonable terms and without unjust discrimination, to use the airport for any aeronautical business or operation up to the capacity of the airport."

[4]The "common facilities" comprise the landing areas, runways, taxiways, loading areas, lighting facilities, public address system, fire protection service and other facilities and services the use and enjoyment of which are shared in common by all air carriers utilizing the Airport. Unless the context otherwise requires, the term "rates" is used throughout this petition to denote the rates charged for the use and enjoyment of such facilities and services

refused a similar lease covering all its activities and occupancies at the Airport. It conducted its operations under authority of a 30-day revocable permit issued by respondent, renting for its private use a maintenance hangar and space in the terminal building. Petitioner was initially charged the same rates for the common facilities as specified in United's and T.W.A.'s leases, such rates having been adopted in 1942 as the published rates for the Airport.

In 1946 respondent's Charter was amended to increase from 20 to 40 years the maximum term for which "lands . . . devoted to airport purposes" could be leased.

Effective September 1, 1946, respondent's Public Utilities Commission adopted a new schedule doubling the published rates for the common facilities. United and T.W.A. continued to be charged the rates fixed in their leases. Petitioner was charged and paid the new rates.

Petitioner continued to press for an integrated lease but was advised that respondent was negotiating a new lease with United and would not discuss the matter with petitioner until those negotiations had been concluded. In 1947 in consideration of United's moving its Cheyenne, Wyoming, maintenance base to the Airport, respondent entered into a new lease with United superseding the 1940 lease. A site for the maintenance base was included and the rates specific for the common facilities were the same as set forth in the 1946 published rate schedule. The term of the new lease was

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under the leases which are involved and pursuant to the schedules from time to time adopted by respondent's Public Utilities Commission.

for 40 years commencing December 1, 1947, and, except for a limited right to renegotiate not to exceed a 10% increase in the rates each five years, no right was reserved to change the rates to be charged United during the leasehold term.

Petitioner thereafter on several occasions renewed its request for an integrated lease. Each time respondent refused to discuss the matter with petitioner.

Effective January 1, 1951, respondent's Public Utilities Commission adopted a new schedule approximately doubling the 1946 published rates. Petitioner refused to pay the increase and this action was commenced by respondent.

C. Manner in Which Federal Questions Were Raised.

Paragraph XVI of petitioner's Amended and Supplemental Answer filed in the trial court, in its pertinent portion, alleges:

> 'The unjust discriminations by plaintiff against defendant alleged in paragraphs XIV and XV are in violation of Section 1110 of Title 49, U. S. Code, and the written assurances and agreements of plaintiff given pursuant thereto to the Civil Aeronautics Administrator. . . ." [Clk. Tr. p. 23.]

This contention was broadened in petitioner's opening statement [Rep. Tr. p. 26] to include respondent's agreements with the United States entered into prior to enactment of the Federal Airport Act, and the issue was tried on that basis.

The trial court ruled that neither the Federal Airport Act nor respondent's agreements with the United States vested any private cause of action in petitioner for

alleged unjust discrimination in the operation of the Airport. (Appendix, pp. 68-70). The District Court of Appeal took the same view (Appendix, pp. 12-26). The point was raised and further argued by petitioner in its petition to have the case transferred to the California Supreme Court for hearing, which petition was denied.

D. The T.W.A. Case.

The Public Utilities Commission's resolution adopting the 1951 schedule expressly exempted carriers having contract rates. Notwithstanding, respondent notified T.W.A. that it would expect T.W.A. to conform with the 1951 schedule or suffer denial of the right to refuel its aircraft at the Airport and later sued to enforce the schedule against United after T.W.A. countered with a Federal diversity action for declaratory relief. T.W.A.'s contract rates were upheld in *Trans World Airlines v. City and County of San Francisco,* 9 Cir., 228 F. 2d 473, cert. den., 351 U. S. 919, on the ground that respondent was specifically authorized by California law to enter into contracts suspending its general rate making power for a reasonable term of years. United's suit which had been held in abeyance was thereafter dismissed at respondent's request.

Reasons for Granting the Writ.

1. The decision of the California District Court of Appeal is directly in conflict with the decision of the Florida District Court of Appeal in *Northeast Airlines, Inc. v. Weiss,* 113 So. 2d 884, cert. den., 116 So. 2d 772 (Fla. Sup. Ct.), on the issue of petitioner's rights under the Federal Airport Act and respondent's agreements with the United States. As here, that case in-

volved air carrier rates at an airport developed with Federal funds, the Miami International Airport, claimed to be unjustly discriminatory in contravention of the Federal Airport Act. Also as here, long-term contract rates not enjoyed by Northeast bottomed the alleged unjust discrimination. The Florida District Court of Appeal held that "a clear statutory policy against unfair, unjust and discriminatory treatment between users of airports" was declared in Section 11 of the Federal Airport Act and that Northeast's complaint for injunction and refund stated a cause of action.[5] 113 So. 2d at 886-889.

The decision of the Florida District Court of Appeal accords with the statute's intendments. As with Section 303 of the Civil Aeronautics Act of 1938, 49 U. S. C. § 453 and Section 308 (a) of the Federal Aviation Act of 1958, 49 U. S. C. § 1349, proscribing any "exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended," the aim of Congress was to "prohibit monopolies and combinations in restraint of trade or commerce, and to promote and encourage competition in civil aeronautics" in accordance with the policies of the Federal aviation laws. 40 Op. A. G. (U. S.) 71, 72.

Section 11 (1) of the Federal Airport Act declares a definite standard established in law and capable of enforcement deviation from which would thwart the purpose of Congress. Congress fashioned no machin-

[5]The California District Court of Appeal found the Florida court's decision "unacceptable as persuasive authority" (Appendix, p. 21), because the primary concern of the decision was whether Northeast should have filed its complaint with the Administrator of Civil Aeronautics or the Civil Aeronautics Board.

ery for enforcement of the standard. As in *Texas & New Orleans R. Co. v. Railway Clerks*, 281 U. S. 548, 568-569, and *Virginian R. Co. v. System Federation*, 300 U. S. 515, 544-545, 550, enforcement by private action must have been contemplated. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U. S. 678, 684.[6]

The Civil Aeronautics and Federal Aviation Acts, the Federal Airport Act and the International Aviation Facilities Act, 49 U. S. C. §§ 1151 *et seq.*, present a comprehensive plan for the development and maintenance of a national and international air transportation system adequate to meet the present and future needs of the foreign and domestic commerce of the United States, the postal service and the national defense. Air carriers have a significant role in that plan and it is manifest that a principal object of the particular statutory provision in question and the agreements required thereunder was to protect air carriers from the disabling effect of favoritism and preference at the airports which they must use.

2. On the merits of petitioner's claim, the decision of the California District Court of Appeal is in conflict

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[6]Compare *Texas & Pacific R. Co. v. Rigsby*, 241 U. S. 33, 39; *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, 261 (dissenting opinion); *Laughlin v. Riddle Aviation*, 5 Cir., 205 F. 2d 948; *Fitzgerald v. Pan American World Airways*, 2 Cir., 229 F. 2d 499; *Wills v. Trans World Airlines, Inc.*, D. C. S. D. Cal., 200 F. Supp. 360; *Allen v. Hussey*, 101 Cal. App. 2d 457, 225 P. 2d 674; *Hillsborough County Aviation Authority v. National Airlines*, 63 So. 2d 61 (Fla. Sup. Ct.); *Southern Airways Co. v. De Kalb County*, 102 Ga. App. 850, 118 S. E. 2d 234; *Park v. Board of Aviation Trustees*, 96 N. H. 331, 76 A. 2d 514.

with this Court's decision in *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, among other decisions. The facilities and services provided by respondent for which the rates in question were charged were shared by United, T.W.A. and petitioner. There was no difference in the facilities or the services as among them. Each used the same facilities and services as the others. Notwithstanding, the California District Court of Appeal ruled that air carriers, such as United, leasing land at the Airport for private use and committing themselves to construct permanent facilities thereon which would be used exclusively by them, lawfully may be granted preferential rates as to the common facilities (Appendix, pp. 45-47).[7] The sole justification for denying petitioner's claim was that it never proposed or was willing to lease land and make permanent improvements for its own private use at the Airport (Appendix, pp. 48-49).[8]

The decision is erroneous. The public service which is involved, and to which Section 11 (1) of the Act and the corresponding provisions of respondent's agreement apply, consists only of the common facilities. Neither Section 11 (1) nor the related provisions of Section 303 of the Civil Aeronautics Act, 49 U. S. C. § 453, and Section 308 (a) of the Federal Airport Act, 49 U. S. C. § 1349, have application to private facilities at the Airport. *Hillsborough County Aviation*

[7]Although the Court placed T.W.A. in the same "rate group" as United, T.W.A. had not leased any land at the Airport or agreed to construct any permanent facilities.

[8]The opinion concedes that the difference in rates cannot be justified on the ground simply that United and T.W.A. were operating at the Airport before petitioner and had integrated leases, whereas petitioner was not afforded such a lease (Appendix, pp. 49-50).

Authority v. National Airlines, 63 So. 2d 61, 63-64 (Fla. Sup. Ct.). Since there was no "difference" in the public service, the "principal of equality . . . forbid[s] any difference in charge." *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, 100. Unjust discrimination is spread on the record here because the rate differential was "based primarily on considerations relating to the identity" of the carriers (namely, their need for private facilities at the Airport) "rather than to circumstances attending the . . . service." *L. T. Barringer v. United States*, 319 U. S. 1, 6.

3. The large number of airports which have been improved and developed with the aid of Federal grants pursuant to the Federal Airport Act underscores the importance of the questions presented.[9]

Conclusion.

For the foregoing reasons, this petition for writ of certiorari should be granted.

October 18, 1962.

Respectfully submitted,

HUGH W. DARLING,
DONALD K. HALL,
523 West Sixth St., Suite 737,
Los Angeles 14, California.
Attorneys for Petitioner.

Of Counsel:
DARLING, SHATTUCK, HALL & CALL,
523 West Sixth St., Suite 737,
Los Angeles 14, California.

[9] Through 1960, a total of 1,584 airports had been Federally assisted pursuant to the Federal Airport Act, at an aggregate cost in Federal funds exceeding $570 million. *FAA Statistical Handbook of Aviation* (1961 ed.), p. 5.

APPENDIX.

Opinion of California District Court of Appeal.

In the District Court of Appeal of the State of California, First Appellate District, Division One.

City and County of San Francisco, a Municipal Corporation, Plaintiff and Respondent, v. Western Air Lines, Inc., a Delaware Corporation, Defendant and Appellant. I Civ. 19344.

Filed May 28 1962.

We are called upon to determine whether the plaintiff municipal corporation is entitled to retain, free of any claim of refund, certain charges made against, and paid under protest by, the defendant airline, for the common use facilities provided by the plaintiff at its San Francisco International Airport. The court below rendered judgment declaring that all of said charges, in the agreed amount of $214,385.74, were properly due and owing to the plaintiff and denying recovery of any portion thereof to the defendant upon its counterclaim. The defendant has appealed.

We must examine the controversy before us in the light of its historical setting. Referring to the litigants as City and Western respectively, we first set forth the salient background facts.

The San Francisco International Airport (formerly called the San Francisco Municipal Airport) is located wholly within the adjoining County of San Mateo. It was first opened in 1927, and upon the adoption of the City's new charter in 1932 was placed under the jurisdiction and management of the San Francisco Public Utilities Commission. It is open to all aircraft providing the aircraft qualifies under rules and regulations of

the Public Utilities Commission prescribing safety measures.

Air traffic in the early years was understandably limited. Boeing Air Transport, a predecessor of United Air Lines, was the first airline to use the airport, its use of the facilities being confined to a short period in the opening year. Operations of other airlines were, at least until 1932, spasmodic. It was found that between 1932 and 1940 many flights into the San Francisco area could not be completed in bad weather because of the lack of federal aids to air navigation. However, two airlines—United Air Lines, hereafter referred to as United, and Transcontinental & Western Air, Inc., later named Trans World Airlines, Inc., hereafter referred to as TWA—the first in 1932 and the second in 1933, inaugurated scheduled air service in and out of the airport. From 1933 until the end of 1943 they were the only scheduled air carriers operating regularly from it. Prior to World War II private and corporate aircraft owners, so-called itinerary craft from other airports, some charter operations and the United States Coast Guard, which maintained an air station there, used the City's airport but there were no nonscheduled air carriers, no cargo planes and no other users of the facilities with airplanes of the same weight category as those of United and TWA. Prior to 1940, neither United nor TWA leased any land at the airport.

On October 1, 1940, the City entered into a lease with United covering the latter's operations at the airport for a term of 20 years. The lease had been put out to public bid pursuant to the provisions set forth in section 93 of City's charter. United was the only bidder; its bid was accepted and approved. This lease,

after a preliminary recital that United was willing to move its western district headquarters from Oakland to the airport, if it could lease certain premises and facilities there, covered 15 acres of land, common use facilities, space in the airport administrative building and provided for the construction by the City on the leased land of extensive capital improvements, the cost of which was to be shared by the City and United on a specified basis.

On October 1, 1952, the City entered into a similar, if less extensive, lease with TWA for a term of 20 years. This lease also had been put out to public bid in accordance with City's charter provisions. TWA was the only bidder; its bid was accepted and approved. TWA's lease covered a specified hangar and adjoining shop space, common use facilities, and space in the airport administration building. Thus each of the two leases, in addition to providing for exclusive use of specific airport premises, also provided for the respective lessee's "use, in common with others authorized so to do, and on the same terms and conditions as apply to others" of so-called common facilities. These facilities are described in identical language in each lease.[1] Each lease provides, in practically the same language, for the payment at identical rates for the privilege of using the foregoing common use facilities.

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[1] Each lease "demises and lets unto Lessee the use . . . of any and all general facilities . . . including, but without limitation, the landing field, runways, aprons, taxiways, sewerage and water facilities, marker and surface lights, floodlights, landing lights, signals, beacons, aids, control tower, and other conveniences for loading, flying, landings and take-offs; and the causeways, docks, wharves and approaches thereto, parking areas, roads, streets, bridges, spur tracks, and other facilities and appurtenances of said airport, . . ."

On June 23, 1941, approximately 9 months after the execution of the United lease and 15 months before the execution of the TWA lease, the City's Public Utilities Commission adopted by resolution a schedule of rates "to be charged . . . . to commerical air line transportation companies for the use of the airport. . . . ." These rates were the same as the rates provided for in the preceding United lease and therefore in the subsequent TWA lease. Indeed the language of the commission's resolution is almost identical with that of the lease. Thus, in net effect, the rates of both leases and of the resolution were the same.

The defendant Western Air Lines, Inc. commenced scheduled operations at the airport on May 1, 1944, pursuant to a certificate of public convenience and necessity granted by the federal Civil Aeronautics Board and a revocable permit issued by the City authorizing use of the common use facilities. Under this arrangement, Western's operations were subject to the above-mentioned 1941 schedule of rates. Thus at such time the rates which aircraft operators paid for the common use facilities were the same for all.

In 1946 the City's Public Utilities Commission adopted by resolution a new schedule of rates to be charged for the common use facilities at the airport which were approximately twice those of the 1941 rate schedule. In the same year the City's charter was amended to permit the Public Utilities Commission to lease airport lands for a period not to exceed forty years instead of a period not to exceed twenty years. (Charter of the City and County of San Francisco (adopted March 26, 1931, in effect January 8, 1932) § 93, as

amended 1946.) The City, through its Public Utilities Commission, thereupon commenced negotiations with United to the end of entering into a new lease for a forty-year rather than a twenty-year term. These negotiations extended over a period of six to eight months. There is testimony in the record that the City proposed to United that a higher rate be charged for the additional property United was interested in leasing, such rate to be in conformity with the 1946 schedule of rates, and that all common use facilities charges be eliminated from the new lease. Apparently United, entrenched behind its existing 1940 lease which froze these rates for an additional 15 years, resisted any attempt to eliminate a rate covenant in the new lease being negotiated, although it would, and eventually did, accept the 1946 schedule of rates if they were made a part of the lease. The new lease was thereafter entered into between the City and United on December 1, 1947, for a term of forty years. Like the 1940 lease it was entered into pursuant to public bidding procedure. It covered not only the 15 acres exclusively leased under the 1940 lease but an additional 73 acres, approximately, to be held on the same basis, and provided for the use by United of the common use facilities,[2] upon the pay-

[2]The paragraph of the 1947 lease dealing with "Common Use of Airport and Airport Facilities" discards the language of the 1941 lease that "[l]essor further demises and lets . . . the use . . . of any and all general facilities" and instead provides that "Lessee shall have the right, license and privilege, subject to the payment of the schedule fees . . . to make use . . . of the Airport and appurtenances, and all facilities, equipment, improvements and services which are or hereafter may be provided at or in connection with the Airport for the common use of those making use of the Airport, including. . . ." The common use facilities thereafter enumerated are largely the same as those enumerated in the 1940 lease. Notable omissions are: control tower, causeways, wharves.

ment of a schedule of rates the same as the above 1946 schedule with a further provision for the revision of rates at five-year intervals, either upward or downward, but not in excess of 10 percent of the rates prevailing at the time of the revision. The new lease further provided that the title to the buildings constructed under the 1940 lease would remain in the City and the title to any new buildings and improvements which United might construct would vest in the City upon the termination of the lease. TWA, however, continued to pay the 1941 rates under its existing 1942 lease.

In the meantime Western had attempted to obtain a long-term lease covering the common use facilities at the airport. When these attempts were renewed during 1946, Western's representative was told that the City would not negotiate such a lease because of the pendency of negotiations on the 1947 United lease. After the execution of the United lease, Western, according to the testimony of its vice president, Dominic P. Renda, continued with its attempts but was advised in 1949 by the City's representatives, including its manager of utilities, that it did not appear likely such a lease would be granted. On cross-examination Mr. Renda stated that at the time the negotiations with United were pending, Western was not interested in leasing any undeveloped property at the airport and was not interested at the time of the trial of the instant case. Western's maintenance base was located at the Los Angeles airport with which Western itself had a thirty-year contract for common use facilities at rates less than those charged at Los Angeles against other carriers which came later and had no leases.

On November 20, 1950, the City's Public Utilities Commission by resolution, adopted, subject to the approval of the board of supervisors of the City, a new schedule of rates and charges for the use of the facilities and services of the airport. Such schedule proposed an increase of the rates applicable to the common use facilities. It was in turn approved by the board of supervisors on December 18, 1950, by a seven-aye, three-no, and one-absent vote. The new rates went into effect on January 1, 1951. Thus, until 1951, Western and United were both paying the same rates for common use facilities, namely those established by the 1946 schedule, Western because of the direct application of the schedule to its operations, United because of the incorporation of the rates of such schedule in its 1947 lease. TWA, pursuant to its 1942 lease, was still paying rates established by the 1941 schedule and incorporated in such lease. Until 1951, therefore, Western made no protest with respect to the rates charged for the common use facilities.

On August 9, 1954, the City's Public Utilities Commission, by resolution, adopted, and on August 23, 1954, the board of supervisors approved a new schedule of rates and charges which, insofar as the issues raised before us are concerned, were approximately the same as the rates established by the 1951 schedule. Western made payments under both the 1951 and 1954 schedules whereas United and TWA continued to pay the lower rates set forth respectively in their 1947 and 1942 leases.

The 1951 schedule sowed seeds of litigation. Western objected to it, claiming that the differential between the rates and charges established therein and those paid by United under its lease constituted unjust discrimina-

tion. The refusal of Western to pay according to the 1951 schedule resulted in the instant action as we shall hereafter set forth.

At the same time the City advised TWA that it would expect payment for the use of the common facilities in accordance with the 1951 schedule. Faced with a threatened denial of its refueling privileges at the airport, TWA, on Feburary 2, 1951, commenced an action in the United States District Court for the Northern District of California, Southern Division, against the City and the members of its Public Utilities Commission seeking a declaratory judgment that TWA's rate were fixed by its lease of October 1, 1942, and injunctive relief against the City's action. On July 2, 1954, judgment was rendered in favor of the City, the court holding in effect that the provisions in the lease setting the rates for common use facilities were superseded by the City's 1951 schedule of rates. (Trans World Airlines v. City and County of San Fran. (N.D. Cal. 1954) 119 F. Supp. 516.) This judgment was reversed by the Court of Appeals (9 Cir. 1955) 228 F. 2d 473, cert. den. (1956) 351 U. S. 919) which held that the City was bound by the rate provisions of its lease.

On October 30, 1953, after the trial but before the judgment in the TWA case, the City commenced an action against United in the same United States District Court to recover for common use facilities furnished United upon the theory that charges for the same should be based on the 1951 schedule rather than on United's 1947 lease. After the reversal of City's judgment in the TWA case, the above action against United was dismissed by the court.

The period covered by our narrative was one of constant growth and expansion in the airport's installations, facilities and traffic. This resulted not only from various bond issues approved by the City's voters for the development of the airport but also in part from federal aid funds granted pursuant to various federal acts. In connection with such federal aid, as we shall later consider in more detail, the City made certain assurances that the airport would be operated for the use and benefit of the public, on fair and reasonable terms and without discrimination. There is abundant evidence in the record of the foregoing expansion and development of the airport. For our present purposes, we need single out only a few significant, salient facts: Fixed capital in service increased from $2,982,163.41 for the fiscal year 1939-1940, immediately preceding United's first lease, to $10,044,297.82 in the first post war (fiscal) year of 1945-1946, to $37,788,653.83 in the fiscal year 1949-1950, immediately preceding the adoption of the 1951 rate schedule, and to $40,854,065.27 in the fiscal year 1950-1951 in which such schedule was adopted. For the same years the number of in and out passengers increased from 126,546 (1939-1940) to 722,408 (1945-1946) to 1,307,307 (1949-1950) and to 1,708,040 (1950-1951). Correspondingly, the number of scheduled movements of air traffic increased from 17,797 (1939-1940) to 44,-

483 (1945-1946) to 79,777 (1949-1950) and to 90,794 (1950-1951).[3]

The present action was commenced on February 8, 1952. The City filed a complaint on common counts to recover the increase of rates which Western refused to pay after the effective date of the 1951 schedule together with other items of alleged indebtedness not germane to this appeal. By written stipulation filed in the instant action on August 12, 1955, the litigants agreed that Western would pay to the City under protest the then accrued unpaid differential between the 1946 and the 1951 and 1954 rates and would continue to pay, under protest, the 1951 and 1954 rates and the City would refund to Western all of the differential in dispute in the event of a final judgment in favor of Western. The parties subsequently agreed that the issues were limited to the charges made against Western for the common use facilities during the period from January 1, 1951, to and including August 31,

[3]Only two scheduled air carriers, United and TWA, operated from the airport during the years 1940 to 1943. By way of comparison, there were 43 or 44 air carriers conducting operations from the airport during the period from January 1954 through September 1957. Scheduled air carriers numbered 16: United, TWA, Western, American Air Lines, British Overseas Airways Corporation, California Central Air Lines, the Flying Tiger Line, Japan Air Lines, Pacific Southwest Air Lines, Pan American World Airways, Quantas Empire Airways, Slick Airways, Southwest Airways, British Commonwealth Pacific Air Lines, Canadian Pacific Air Lines, and Philippine Air Lines. In addition, there were 11 carriers performing scheduled contract services for the Military Transport Service, and 17 nonscheduled or chartered air carriers (these last during the period July 1955 to June 1956).

1957,[4] and that the amount in controversy was $214,385.74. These issues were raised by amended pleadings of the parties.[5] Western's position was that the charges, being discriminatory, were not only beyond the power of a public utility to exact but were also in violation of the Federal Airport Act and of various assurances given by the City to the federal government that the airport would be operated without unjust discrimination.

We find no disagreement between the parties as to what the term "common use facilities" embraces. It appears clearly from the evidence to include generally the complete landing area, runways, taxiways, the aircraft loading area, the public address system used for flight information, airport lighting facilities, fire protection service and the emergency alarm service. It is also clear that no air carrier has ever been refused the common use facilities of the airport.

The trial court found and concluded that the airport was a public enterprise but not a public utility, that the furnishing of common use facilities there did not con-

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[4]The parties apparently agreed on this terminal date because of a supplemental agreement entered into between the City and United on August 22, 1957, under the terms of which United agreed as of July 1, 1957, to pay the same rates as the other carriers, thus eliminating differentials except as to the lower rate still being paid by TWA under its 1942 lease.

[5]Upon leave of court granted at the time of the pre-trial conference Western filed an amended answer denying liability together with a counterclaim for recovery of all monies paid by it to the City under protest. On the first day of trial the City filed a supplement to complaint in effect amending its first common count on a book account to allege an indebtedness of $214,385.74. On the sixth trial day the City filed an amended complaint in effect repeating such claim on a book account, and further alleging that the above indebtedness included $16,800 for airport fire protection services.

stitute a public utility service, that the City had not wrongfully and unjustly discriminated in favor of United and TWA and against Western, that the City had committed no unjust discrimination in violation of the Federal Airport Act or the City's assurances given pursuant thereto, and that the sum of $214,385.74 was legally and properly chargeable to Western, and due and owing to the City. Judgment for said amount, without interest, but with costs, was rendered in favor of the City.

Western contends before us that: 1) The protested rates were illegally and unlawfully assessed and colleted, being unjustly discriminatory in violation of the Federal Airport Act and the City's agreements with the federal government; 2) the airport is a public utility and therefore charges made for its common use facilities must be uniform, equal and nondiscriminatory; and 3) the 1951 schedule of rates did not become legally effective and hence the rates billed to Western pursuant thereto were illegally charged and collected. We consider them in the order presented.

Western has no right of recovery by virtue of the Federal Airport Act or City's agreements with the federal government.

Western asserts a claim of unjust discrimination on two bases: First, it argues that the Federal Airport Act and various assurances given by the City upon the receipt of federal aid for its airport preclude the exercise on the part of the City of any power to discriminate among air carriers. Secondly, it maintains that the airport is a public utility and, as such, is prevented from prescribing any *unjustly* discriminatory rates and charges.

Over the years, improvements at the airport were in part financed by federal funds and in order to receive them the City was required to give certain assurances to the federal government. Western has directed our attention to several instances of such aid which fall conveniently into two general classifications —those made before, and those made pursuant to, the Federal Airport Act of 1946.

Between 1935 and 1942, City received for use in the development of its airport, substantial WPA funds provided under various federal acts.[6] Upon request of federal officials, City's Public Utilities Commission, on March 8, 1937, passed a resolution (Res. #1857) stating in part: "the Public Utilities Commission . . . hereby declares as its policy that said airport will at all times be operated and maintained as a municipal airport for the public benefit, *without unjust discrimination against or in favor of any aircraft operator, including any scheduled airline operator.* . . ." (Emphasis added.) Similar federal funds were received during World War II under the airport project program. As a recipient of aid under this program the City, through its Public Utilities Commission, passed resolutions (Res. #4808, January 12, 1942; #6182, June 5, 1944) each of which stated as follows: "(d) The City agrees that, continuously during the term of this agreement, the Airport will be operated as such . . . and . . . it will at all times be operated for the use and benefit of the public, on reasonable

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[6]Appellant cites the following statutes: Emergency Relief Appropriation Act of 1936 (49 Stat. 1608), of 1937 (50 Stat. 352), of 1938 (52 Stat. 809), of 1939 (53 Stat. 927), of 1941 (54 Stat. 611), of 1942 (55 Stat. 396) and of 1943 (56 Stat. 634).

terms and *without unjust discrimination*, and without grant or exercise of any exclusive right for use of the Airport within the meaning of Section 303 of the Civil Aeronautics Act of 1938." (Emphasis added.)[7] Finally, during the war, as part of the overall settlement of the condemnation action commenced by the United States of America to acquire Treasure Island from the City and for the City's release of all claims thereto, the Army and Navy agreed to construct and complete certain improvements at the San Francisco Airport.[8] In each of said agreements, the City agreed that the airport "will at all times be operated for the use and benefit of the public on reasonable terms and *without unjust discrimination* and without grant or exercise of any exclusive right for use of [the Airport] within the meaning of Section 303 of the Civil Aeronautics Act of 1938." (Emphasis added.).

After the war, the City received funds for the development of its airport pursuant to the Federal Airport Act of 1946 (49 U.S.C.A. §§ 1101-1119). Such funds were received during the ten fiscal years beginning with the year 1948-1949 and ending with the year 1957-1958. The grand total for all years was

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[7]Each resolution states that the Civil Aeronautics Administrator "has designated as necessary for national defense a project . . . for development of the San Francisco Airport. . . ." Resolution No. 4808 states that the administrator acts pursuant to the Third Supplemental National Defense Appropriation Act of 1942.

[8]Separate agreements were entered into between the City and the United States acting through the Secretary of the Navy (Navy agreement—March 1, 1944) and the United States, acting through the Secretary of War (Army agreement—March 15, 1944). Said agreements were made a part of the final judgment of condemnation rendered by consent of the parties on April 3, 1944, in the condemnation action pending in the United States District Court in San Francisco.

$6,007,025.86. Both the applicable statute (49 U.S.C.A. §§ 1108, 1110, 1111) and the administrative regulations thereunder (14 C.F.R. §§ 550.1-550.8) required the City as sponsor, to submit project applications to, and enter into grant agreements with, the Administrator of Civil Aeronautics. Assurances in writing were required to be given to the administrator (49 U.S.C.A. § 1110 subd. 1) that "the airport to which the project relates will be available for public use on fair and reasonable terms and *without unjust discrimination.*" (Emphasis added.) The various grant agreements incorporated the respective project applications and provided that the City "shall operate and maintain the Airport as provided in the Project Application. . . ." The project applications in turn contained the following provisions: "3. The Sponsor will not exercise, grant or permit any exclusive right for the use of the Airport forbidden by Section 303 of the Civil Aeronautics Act of 1938, as amended. . . . 4. The Sponsor agrees that it will operate the Airport for the use and benefit of the public, on fair and reasonable terms and *without unjust discrimination.*"[9] (Emphasis added.)

Appellant argues that the foregoing statute, assurances and resolutions not only preclude discrimination but give the airline discriminated against the right to recover the differential in rates. Although appellant claims that the protested rates were in violation of all

[9]The project application of May 17, 1948, and its accompanying grant agreement incorporated City's "Sponsor's Assurance Agreement" which contained not only the above provision on unjust discrimination but also provided that, subject to an exception not applicable: "the sponsor will permit all qualified operators, on reasonable terms and *without unjust discrimination*, to use the airport for any aeronautical business or operation up to the capacity of the airport." (Emphasis added.)

the City's agreements summarized above, it is apparent that its alleged right of recovery is predicated principally on the Federal Airport Act and the City's assurances given pursuant thereto. We shall therefore consider this aspect of the argument first, and then the City's earlier agreements.

At the outset we find nothing either in the Federal Airport Act itself or in the assurances required and given thereunder specifically conferring on Western a right to recover excessive airport charges. The act provides for the recovery by the Civil Aeronautics Administrator of payments made in excess of the United States' share of the total project costs and of certain advance payments for which the United States has received no benefit. (49 U.S.C.A. § 1113.) It also prescribes criminal penalties for false statements, representations and reports. (49 U.S.C.A. § 1118.) We find no other provision permitting recovery by the administrator and no provisions at all giving any right of recovery to any other person. An examination of the act as a whole discloses that its purpose is to promote a nationwide system of public airports (see 49 U.S.C.A. § 1102) and not to regulate airport operations.[10]

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[10]Every expression of the intent of Congress in enacting the Federal Airport Act of 1946 and the various amendments thereto indicates that the purpose of the legislation is to establish a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics by providing for the development and improvement of civilian airports with federal financial aid in accordance with a national airport plan. (49 U. S. C. A. §1103; House Report No. 1570, March 16, 1948, 1948 U. S. Code Congressional Service, p. 1469, at pp. 1469, 1471; House Report No. 2709, July 24, 1950, 1950 U. S. Code Congressional Service, p. 3945, at pp. 3945-3946; House Report No. 93, March 2, 1959, 1959 U. S. Code Congressional & Administrative News, p. 1705 at p. 1707; Senate Report No. 654, August 1, 1961, 1961 U. S. Code Congressional & Administrative News, p. 2707, at p. 2710; House Report No. 728, July 18, 1961, 1961 U. S. Code

The various assurances and agreements required from the sponsor, in this case City, under the act are promotive of such general purpose. The granting agreement in each instance entitles the administrator to recover all grant payments made where there has been any misrepresentation or omission of a material fact by the sponsor. We find no other provision for recovery of funds by the administrator and none whatsoever permitting recovery of money or excess rates by a private party. Indeed the language of the granting agreement itself appears to us to point up that it is simply and entirely a financial arrangement between two parties. As the agreement states, it constitutes "the obligations and rights of the United States and the Sponsor with respect to the accomplishment of the Project. . . ." This echoes the language of the statute (49 U.S.C.A. § 1111).

None of the documents under consideration confers on Western the rights of a third party beneficiary. The various contracts and assurances created benefits and detriments as between only two parties—the United States and the City. Nothing in them shows any intent of the contracting parties to confer any benefit directly and expressly upon air carriers such as the defendant. It is true that air carriers, including Western, may be *incidentally* benefited by City's assurances

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Congressional & Administrative News, p. 2737 et seq. Cf. House Report 701, July 22, 1959, 1959 U. S. Code Congressional & Administrative News, p. 2065, at p. 2066.) Nothing in the above cited expressions of legislative purpose, or in any other legislative history materials, manifests an intent, either express or implied, to provide users of the airports receiving aid with a private remedy for alleged discrimination. (Cf. 1949 U. S. Code Congressional Service, pp. 1601, 1811, 1813, 2208, 2279; 1955 U. S. Code Congressional & Administrative News, p. 2599.)

in respect to nondiscriminatory treatment at the airport. They may also be incidentally benefited by the fact that, through federal aid, a public airport is improved with longer runways, brighter beacons, or larger loading ramps, or by the fact a new public airport is provided for a community without one. The various documents and agreements were part of a federal aid program directed to the promoting of a national transportation system. Provisions in such agreements, including the nondiscrimination clauses, were intended to advance such federal aims and not for the benefit of those who might be affected by the sponsor's failure to perform.

To recover as a third party beneficiary, one must show that the contract in question was made expressly for his benefit. (Civ. Code § 1559; Shutes v. Cheney (1954) 123 Cal. App. 2d 256, 262.) While it is not necessary that the third party be specifically named as a beneficiary and that "expressly" means "in an express manner; in direct or unmistakable terms; explicitly; definitely; directly" (Le Ballister v. Redwood Theatres, Inc. (1934) 1 Cal. App. 2d 447, 448; Watson v. Aced (1957) 156 Cal. App. 2d 87, 92), nevertheless, as stated in Shutes v. Cheney, supra, "an intent to make the obligation inure to the benefit of the third party must have been clearly manifested by the contracting parties. [Citation.] Where a contract incidentally benefits a third person but is not expressly made for his benefit, he cannot recover thereon. [Citations.]" (P. 262.) Moreover, "[a] promisor bound to the United States . . . by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of per-

forming or attempting to perform it, or of failing to do so, unless. . . . an intention is manifested in the contract, as interpreted in the light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences. . . ." (Rest., Contracts, §145.) (See also Ukiah v. Ukiah Water and Imp. Co. (1904) 142 Cal. 173, 178-180.)

Appellant urges that the above rule of the Restatement is intended to apply only to promisors who are private persons, citing the *Ukiah* case, supra. No such principle is announced in *Ukiah*. Nor is any such intention apparent in the above section 145 of the Restatement of Contracts. The only limitation in such section as to the class of the contracting parties is that the *promisee* be a governmental body. If it had been intended to restrict the application of the rule to nongovernmental *promisors*, such limitation would and easily could have been imposed. Private persons on the one hand and governmental units acting in a proprietary capacity on the other are not such disparate promisors as to require us to read into the rule a restriction it does not express.

The main thrust of Western's argument is aimed past the parry of no specific statutory authority and no enforceable third party beneficiary claim. The Federal Airport Act, appellant argues, commands nondiscriminatory treatment of airport users by the recipients of federal aid, and therefore the violation of such mandate on the part of the airport, creates, by implication, an actionable civil right in the airport user which can sue for the resulting harm. Western places principal reliance on the case of Northeast Airlines,

Inc. v. Weiss (D.C.A. Fla. 1959) 113 So. 2d 884, cert. den. (Fla. S.Ct. 1959) 116 So. 2d 772) and cites additional cases as supporting analogues.

The facts of the *Northeast Airlines* case are strikingly similar to those of the case before us. In an action against the port authority having jurisdiction over the Miami airport, also developed and improved by federal funds under various acts of Congress, the plaintiff air carrier complained that it was charged rates and fees which were in excess of those charged its competitors National Airlines and Eastern Air Lines for the same services. The rates charged plaintiff were levied pursuant to resolution of the authority, whereas the lower rates charged its two competitors had been established prior thereto by lease agreements. Northeast sought an injunction and refund of the excess charges apparently relying on, among other bases, the Federal Airport Act of 1946 (49 U.S.C.A. § 1110). On the defendants' motion to dismiss, the trial court held that, since the plaintiff had not exhausted available administrative remedies, the suit was presented prematurely and rendered an interlocutory order requesting plaintiff to file its complaint with the Civil Aeronautics Administration or have its complaint dismissed. This order was reversed by the Florda District Court of Appeal which held that "the equity court had jurisdiction of the cause, and that it was not to be deprived thereof either because of the doctrine of exhaustion of administrative remedies, or the doctrine of primary jurisdiction." (113 So. 2d p. 887.) This was the only question in the case and the limit of the appellate court's holding. Contrary to appellant's contention, the court did not consider, much less de-

cide, that a violation of the above section of the Federal Airport Act created a civil right of action in the plaintiff airline. We find the case unacceptable as persuasive authority.[11]

We turn to appellant's additional authorities. First we are referred to several federal cases, four of which are opinions of the Second Circuit. While they are undoubtedly sound statements of legal principle, they are not helpful to appellant. All of them involve situations which, to use the language of Judge Learned Hand in one of them, Reitmeister v. Reitmeister (2 Cir. 1947) 162 F. 2d 691, 694, fall "within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of

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[11]In Aerovias Interamer. De Panama v. Board of County Com'rs (D. C. Fla. 1961), 197 F. Supp. 230, 14 foreign and 4 domestic airlines brought an action for injunctive relief and recovery of overcharges against the same port authority as operator of the Miami International Airport. The basis of the action was that the airport charged foreign airlines higher rental and service rates for its facilities than rates charged domestic airlines. The original complaint alleged that the action was based on the Federal Airport Act (49 U. S. C. A. §1110), the Federal Aviation Act (49 U. S. C. A. §1301), the Surplus Property Act (50 U. S. C. A. §1622) and upon alleged violations of certain treaties (Chicago Convention) and of certain service agreements entered into between the United States and the countries of domicile of the plaintiffs. The complaint was dismissed as to the domestic airlines and the action proceeded to trial as to the remaining foreign airline plaintiffs on the sole legal theory of the violation of the above treaties and agreements. Although the reason for the court's action is not disclosed by the opinion, it appears that no plaintiff was able to state a cause of action under the Federal Airport Act. "[N]either the diverse Federal Statutes relied on by the plaintiffs, nor the restrictions contained [in a certain deed] . . . gave a right to any of the plaintiffs to sue." (197 F. Supp. at p. 236.)

a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal."

Thus in Fitzgerald v. Pan American World Airways (2 Cir. 1956), 229 F. 2d 499,[12] an internationally known singer and two of her companions, all Negro airline passengers, brought an action for damages for unjust discrimination, because of their race or color, in violation of 49 U.S.C.A. section 484, subdivision (b), a provision of the Civil Aeronautics Act of 1938 proscribing unjust discrimination. The passengers alleged that although holding reservations, they were prevented from continuing their flight because of their race or color. The pertinent act, so far as applicable, provided for both criminal penalties and administrative remedies. As to the first, 49 U.S.C.A. section 622, subdivision (a) made it a federal crime knowingly and wilfully to violate designated sections of the act including section 484, subdivision (b). As to the second, 49 U.S.C.A. section 642, subdivisions (a), (b) and (c) provided for the administrative process before the Civil Aeronautics Board of complaint, investigation and order of compliance. The Court of Appeals, reversing dismissal by the District Court, held that since the act made it a federal crime to violate section 484, subdivision (b), which proscribed discrimination, the viola-

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[12]Appellant claims that the *Fitzgerald* case supports the *Northeast Airlines* case. The latter case relied on Fitzgerald only in support of the proposition that the doctrine of primary jurisdiction was not applicable.

tion of such section created an actionable civil right in the plaintiffs as members of a class for whose benefit the statute was enacted.[13]

Three other cases of the Second Circuit cited in *Fitzgerald* are also relied upon by appellant, as well as one case from the Fifth Circuit. As we have pointed out, they involve the same principle applied to other federal statutes. In Reitmeister v. Reitmeister, supra, (2 Cir. 1947) 162 F. 2d 691, the court held that the Communications Act of 1934, 47 U.S.C.A. section 151 et seq., imposed a civil as well as a criminal liability although the statute made no provision for the former. In Fischman v. Raytheon Mfg. Co. (2 Cir. 1951) 188 F. 2d 783, it was held that although section 10, subdivision (b), of the Securities Exchange Act of 1934 (15 U.S.C.A. § 78a et seq.) did not explicitly authorize a civil remedy, it did create one since it made unlawful the conduct which it proscribed and since there was also an indication that Congress had always assumed that private actions were available under the statute. In Goldstein v. Groesbeck (2 Cir. 1944) 142 F. 2d 422, the plaintiff, a minority stockholder of certain operating companies, brought a shareholder's derivative action against certain holding companies and their officers charging that contracts had been made in violation of section 4(a)(2) of the Public Utility Holding Company Act of 1935 (15 U.S.C.A. § 79d(a)(2)). The proscribed conduct was made unlawful by the act which provided specific

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[13]For a further application of this principle see Wills v. Trans World Airlines, Inc. (S. D. Cal. 1961), 200 F. Supp. 360, in which the civil right of action was upheld on behalf of an airline passenger "bumped" off an oversold flight though having priority of reservation.

sanctions in the form of injunctive relief, criminal penalties and declaring the contracts void. The court upheld a private right of action upon the ground that the operating companies were members of a class for whose ultimate protection the legislation was intended.

Two other cases cited by appellant are to the same general effect. In Laughlin v. Riddle Aviation Co. (5 Cir. 1953) 205 F. 2d 948, the court permitted recovery by an airline pilot of wages at the higher rates prescribed by a decision of the National Labor Relations Board and adopted by the Civil Aeronautics Act on the ground that the plaintiff was obviously one of the persons for whose benefit the statute was enacted, even though no civil remedy was specifically provided therein. The case of Texas & New Orleans R.R. Co. v. Brotherhood of Railway etc. Clerks (1930) 281 U.S. 548, held that an enforceable civil right for an injunction existed for violation of section 2, subdivision 3, of the Railway Labor Act of 1926. Such section in effect provided that representatives of management and labor should be selected without interference, influence or coercion by either party over the other. Interpreting all of the act as a whole, in the light of prior legislation in the field, the court concluded that it was the intention of Congress in prohibiting the above conduct, to create a legal right in each labor group even though no statutory penalty was prescribed for the prohibited acts.

The case before us does not fall within the above doctrine. Neither section 11 of the Federal Airport Act of 1946 (49 U.S.C.A. § 1110) nor any other section of such act indicates an intention to benefit or protect the class of airline users of airport facilities. No

section of the act prohibits unjust discrimination or makes it unlawful. No section of the act makes it a federal crime to breach or violate the written assurances against unjust discrimination required by section 11. As we have pointed out, the criminal penalties of the act apply only to the making of false statements and reports. We can find no basis, therefore, for concluding that an actionable civil right is created for an airline as a member of a class for whose protection the statute was enacted.

The case of Allen v. Hussey (1950) 101 Cal. App. 2d 457, also cited by appellant, does not support the proposition which appellant urges. In the *Allen* case leases made by an irrigation district to the defendant Hussey covering an airport and adjacent property, including one lease for a term of 34 years at a rental of $1 a year, with an option to renew for an additional 35 years, were held invalid as being contrary to public policy, in breach of trust and in violation of a WPA sponsor's agreement executed by the board of directors of the district agreeing that the airport would not be leased to a nonpublic agency or private individual. The leases were held cancellable upon suit brought by any property owners of the district who were the beneficiaries of the public trust. The case does not hold that a private legal remedy is created by the statute involved.

Finally we return to the earlier federal grants in aid received by the City before the Federal Airport Act.

Our examination of the various resolutions of City's Public Utilities Commission and of the so-called Army and Navy agreements entered into upon the transfer of Treasure Island fails to disclose any intention on the part of the contracting parties that the assurances therein contained with reference to unjust discrimination were made for the express benefit of aircraft operators. What we have said with respect to the enforceability by third parties of the assurances given under the Federal Airport Act is applicable here. We find nothing creating an enforceable third party beneficiary claim or a right of recovery in aircraft operators for breach of the assurances.

We hold, therefore, that neither the Federal Airport Act of 1946 nor any of the assurances or agreements given by City under said act or other acts created any cause of action in Western for any alleged unjust discrimination and that the conclusion of the trial court to such effect was proper and must be sustained.

The airport is a public utility.

We proceed to determine whether appellant's claim of unjust discrimination can be asserted on the basis that the airport is a public utility whose rates and charges under acceptable legal principles must be uniform, equal and nondiscriminatory.

The court below, as we have pointed out, concluded that it was a public enterprise but not a public utility and that the common use facilities thereat did not

constitute a public utility service. The issue, involving no evidentiary conflict, presents a question of law.[14]

We begin with the San Francisco Charter. In our view, a fair reading of the applicable provisions of the City's organic law shows an intent to designate and establish its airport as a public utility. Section 120 of the charter provides for the creation of a Public Utilities Commission. Section 121 provides as follows: "The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation and control of *all public utilities* and other properties used, owned, acquired, leased or constructed by the city and county, *including airports*, for the purpose of supplying any *public utility service* to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof." (Emphasis added.) Section 122 provides: "The San Francisco municipal railway, the San Francisco water department, the Hetch Hetchy project until the completion thereof when it shall be merged with the water department, *the airport*, and *any other public utility* hereafter acquired, shall each be designated as a department under the com-

[14]Interestingly, City in its original complaint alleges that its charter confers jurisdiction in the Public Utilities Commission "to manage all public utilities . . . including the San Francisco Airport." This allegation was incorporated into City's supplement to complaint but omitted from its amended complaint. The record is not clear that, as respondent states, the trial court found as a matter of fact that the airport is not a public utility. By virtue of a general finding, the court found *inter alia* that the denials in paragraph III of defendant's amended and supplemental answer were untrue, defendant *denying* in such paragraph "that the San Francisco Airport is a public utility by virtue of plaintiff's Charter, or otherwise." The above does not affect our statement *supra* that the question is one of law.

mission, . . ." (Emphasis added.) Finally, if further confirmation be required, we have the following language of section 125: "The public utilities commission shall have jurisdiction over the *airport* now being conducted by the City and County of San Francisco, as well as over any other airport which said city and county may hereafter acquire, maintain or operate." (Emphasis added.) The above sections read as a whole convince us that the charter intended to make the airport a public utility and to place it under the jurisdiction of City's Public Utilities Commission to be managed and operated as such.

Our views are not unsettled by respondent's interpretation of the above sections, which we find unconvincing. City argues that under section 121 a distinction is made between "public utilities" and "other properties used, owned, acquired, leased or constructed by the city and county, including airports, for the purpose of supplying any public utility service. . . ." We discern no intent to create distinct categories of properties but simply, by the use of comprehensive language, to place under the jurisdiction of the commission all utilities and property used in supplying utility service.

Whatever force City's argument might have if section 121 stood alone, is dissipated when the section is read together with section 122, which refers to "the airport, and any other utility. . . ." City's further contention that the airlines, rather than City itself, furnish the public utility service of transportation at its airport completely ignores the heart of the issue. The city furnishes a public utility service to the airlines, which in turn serve the public as utilities. (Richfield Oil Corp. v. Public Util. Com. (1960) infra, 54 Cal. 2d 419, 431, cert. den. 364 U.S. 900.)

In its construction of section 122 City then advances the theory that, in turn, such section provides for two categories (a) public utilities and (b) entities which are not public utilities, giving as an example of the latter, the Hetch Hetchy project. The obvious aim of City's theory is to remove the airport from the first class and place it in the second. It is to be noted that the sole possible member of the second category posited by City is the Hetch Hetchy project; City furnishes us with no authority that such project is *not* a public utility. Quite apart from this however, it appears to us to be a reasonable construction of section 122 that the framers of the charter treated all entities therein listed, including the airport, as public utilities. City adverts to other language of section 122 pertaining to the creation of bureaus for handling matters "that do not pertain exclusively to any one utility or department" and urges that the use of the word "department" shows that the charter did not intend the activities listed therein be declared public utilities by placing them under the jurisdiction of the Public Utilities Commission. This argument ends in futility for City when we consider that the San Francisco Municipal Railway and the San Francisco Department, both of which City concedes to be public utilities, are also designated as departments. (Section 122.)

In its proffered construction negating public utility status for the airport, City takes the position that, if section 122 be conceded to declare the airport a public utility, the portion of section 125, quoted by us *supra*, stating that the commission shall have jurisdiction of the airport, is superfluous. We do not agree. Section 125 deals with the subject of employment of per-

sonnel and in effect states that while airports shall be under the jurisdiction of the commission, all airport employees, except the manager, shall acquire civil service status and be thereafter governed by the civil service provisions of the charter. Finally, City argues that where the charter intends to declare an activity a public utility, the expression of its intent is unequivocal as in section 121 which states: "Foreign trade zones, as may be authorized by acts of Congress to be located in the city and county, are hereby declared to be public utilities within the meaning of this charter." The absurd result of such reasoning would be that the charter would reflect no intent to create any public utilities other than foreign trade zones, and City would be forced to conclude that the municipal railway and the water department had not been unequivocally established as public utilities.

In addition, City's Public Utilities Commission when establishing rates for the common use facilities at the airport did so pursuant to section 130 of the charter which grants authority to the commission to fix, change and adjust rates, charges and fares of public utilities. The commission, for example, in its resolutions establishing the 1951 and 1954 schedule of rates, referred to by us earlier, obviously took such action pursuant to section 130 and further resolved that the schedules be submitted to City's board of supervisors "as required by Section 130 of the Charter."[15]

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[15]It is also significant that in the case of Trans World Airlines v. City and County of San Francisco, *supra*, the City took the position both before the United States District Court and the Court of Appeals that the San Francisco airport *was* a public utility. (119 F. Supp. 516; 228 F. 2d 473.)

In essence, a public utility is the dedication of property to a public use. The much cited case of Allen v. Railroad Commission (1918) 179 Cal. 68 contains the classic statement of principle: " 'What is a public utility . . .? In its broadest sense everything upon which man bestows labor for purposes other than those for the benefit of his immediate family, is impressed with a public use. . . . What differentiates all such activities from a true public utility is this, and this only: That the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the right to demand that that service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges. Public use, then, means the use by the public and by every individual member of it, *as a legal right*. Such is not only the accepted significance of the phrase by the great weight of authority . . . but is the definition repeatedly announced by this court.' " (Pp. 88-89.) (See also Richfield Oil Corp. v. Public Util. Com. (1960) 54 Cal. 2d 419, 430-435, cert. den. 364 U.S. 900; Cudahy Packing Co. v. Johnson (1939) 12 Cal. 2d 583, 586.)

City's airport conforms to this traditional concept. It is beyond question a public airport—indeed an international airport—serving the general passenger public without reservation or restriction. In respect to the problem at hand, it also serves that segment of the public engaged in operating aircraft; that is, operators of scheduled airlines, nonscheduled carriers and private aircraft. The common use facilities of the airport are available for, held out to, and enjoyed by all such operators. Such operators are the customers or patrons of the airport. No air carriers properly cer-

tified under federal law are excluded. No carrier or aircraft using the airport is refused its common use facilities. It is clear to us that such common use facilities constitute a public utility service.

The fact that the number of those using or enjoying the above public utility service, namely the operators of aircraft, is by circumstance relatively limited, does not destroy the public character of the service. (Terminal Taxicab Co. v. Kutz (1916) 241 U.S. 252, 255; Camp Rincon Resort Co. v. Eshleman (1916) 172 Cal. 561, 563-564; Ford Hydro-Electric Co. v. Town of Aurora (1932) 206 Wis. 489, 496-497, 240 N.W. 418.)

Our conclusion that the airport is a public utliity and its common use facilities are a public utility service is consonant with recognized authority (see 12 McQuillin, Municipal Corporations, § 35.04 at pp. 571-573; § 35.06 at p. 584) and decisions of other states:[16]

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[16]There is respectable authority holding that a municipally owned airport is a public utility, independent of any constitutional or statutory declarations to that effect. Price v. Storms (1942), 191 Okla. 410, 412, 130 P. 2d 523; Ex parte Houston (1950), 93 Okla. Crim. 26, 58 (on rehearing), at 71 (dictum); State, *ex rel.* Chandler v. Jackson (1929), 121 Ohio St. 186, 187-188, 167 N. E. 396; City of Toledo v. Jenkins (1944), 143 Ohio St. 141, 149-150, 54 N. E. 2d 656; Jones v. Kock (1946), 79 Ohio App. 549, 553, 74 N. E. 2d 644; State *ex rel.* Helsel v. Board of County Com'rs (Ct. Com. Pleas 1947), 37 Ohio Opinions 58, 79 N. E. 2d 698, 703, *aff'd* (1948), 83 Ohio App. 388, 78 N. E. 2d 694; *appeal dismissed* (1948), 149 Ohio St. 583, 79 N. E. 2d 911; cf. State, *ex rel.* Hile v. City of Cleveland (1927), 26 Ohio App. 265, 266, 160 N. E. 241; State, *ex rel.* City of Lincoln v. Johnson (1928), 117 Neb. 301, 303-304, 220 N. W. 273.

We have not been referred to any cases, nor have any been found, holding that a municipally owned airport is *not* a public utility.[17]

City has attempted to negate this public utility status of its airport on a number of grounds, all of which we find untenable. Its basic argument is that in the absence of a declaration that a particular enterprise is a utility by Constitution, statute or other applicable law, such enterprise will not be deemed a public utility even though involving services available to the public generally. However, in support of its argument, City cites cases dealing with utilities subject to the California Public Utilities Commission. Such commission, of constitutional origin, has jurisdiction over some public utilities. (Cal. Const., art. XII, §§ 22-23; Pub. Util. Code §§ 202-2113, 2501-2728, 2901-2976.) It does not and conceivably could not have jurisdiction over a municipally owned public utility. "In the absence of legislation otherwise providing, the [California Public Utilities] commission's jurisdiction to regulate public utilities extends only to regulation of *privately* owned utilities." (Los Angeles Met. Transit Auth. v. Public Util. Com. (1959) 52 Cal. 2d 655, 661; emphasis added.) Unless the enterprise or activity in question is a public utility as defined in the

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[17]It is worthy of note that in Trans World Airlines v. City and County of San Fran., *supra*, 119 F. Supp. 516, the U. S. District Court concluded that the very common use facilities involved in the instant case were offered by the San Francisco airport as a public utility service. Although reversing the District Court, the Court of Appeals did *not* hold that the airport was not a public utility or that the above facilities were not a public utility service. (Trans World Airlines v. City & County of San Francisco (9 Cir. 1955), 228 F. 2d 473, cert. den. (1956), 351 U. S. 919.)

Constitution or Public Utilities Code, it is not subject to the jurisdiction of such commission. (Television Transmission v. Public Util. Com. (1956) 47 Cal. 2d 82, 84.) Respondent's cases therefore (City cites *inter alia*: Television Transmission v. Public Util. Com., supra; Richfield Oil Corp. v. Public Util. Com., supra, 54 Cal. 2d 419; Pajaro Valley Cold Storage Co. v. Public Util. Com. (1960) 54 Cal. 2d 256) holding that certain enterprises do not fall within the defined classes, are not determinative of the problem at hand. Respondent's further argument that airports are not within the defined classes, in our view, has nothing to do with the present issue. Whether or not City's airport is a public utility, it would not be subject to regulation by the California Public Utilities Commission.[18]

Additional authorities referred to by City dealing with facilities operated by the municipalities in question in their *governmental* capacities are also distinguishable. (City cites *inter alia*: City of National City v. Fritz (1949) 33 Cal. 2d 635, construction of sewers; Glass v. City of Fresno (1936) 17 Cal. App. 2d 555, garbage collection; Larsen v. City & County of S. F. (1957) 152 Cal. App. 2d 355, offstreet parking.) In each of the foregoing cases the basis of holding that the facility in question was not a public utility was the fact that in operating such facilities, the City was exercising *governmental functions*, whereas a city in the operation of its public utilities acts in a *pro-*

[18]It is to be noted that the Public Utilities Code contains provisions dealing with utilities owned by municipal corporations. Although not applicable to respondent here, such sections delineate a wide area for municipal activity in the public utility field. (See Pub. Util. Code §§10001-10213.)

prietary capacity. (Larsen v. City & County of S.F., supra, 152 Cal. App. 2d 355, 367.)[19]

Respondent places particular reliance upon the opinion of this court in the *Larsen* case. In *Larsen* we were presented with the question whether a proposed off-street parking facility to be constructed under the authority of the Parking Law of 1949 (Sts. & Hy. Code §§ 32599-34859) was a public utility so that leases thereof were subject to section 123 of the San Francisco Charter. The four reasons underlying our holding in *Larsen* that offstreet parking was not a public utility do not exist as determining factors in the present problem pertaining to the City's airport. First, in *Larsen*, we observed that neither the City's charter, nor any legislative act, nor the Constitution defined offstreet parking as a public utility. In the instant case, as we have pointed out, the charter declares that the airport is a public utility. Second, in *Larsen*, the Parking Law of 1949 provided that the functions undertaken thereunder were governmental. In the instant case, as stated above, the City, in operating a public airport, acts in a *proprietary* capacity. Third, in *Larsen*, the Parking Law of 1949 vested control of the facility in the Parking Authority and not in the City's municipal regulatory body. In the instant case, the airport is placed under the jurisdiction of the City's

[19]The following language from Coleman v. City of Oakland (1930), 110 Cal. App. 715, 720, is pertinent to the problem at hand: "We have no hesitancy in deciding that in the conduct of an airport the municipality is acting in a proprietary capacity. An airport falls naturally *into the same classifications as such public utilities as* electric light, gas, water, and transportation systems, which are universally classed as proprietary." (Emphasis added.)

Public Utilities Commission. (San Francisco Charter §§ 121, 125.) Regulatory power vested in the City pursuant to the Municipal and County Airport Law (Gov. Code § 50474) is in turn vested by the City's charter in its Public Utilities Commission. (San Francisco Charter §§ 121, 125, 130.) Fourth, in *Larsen*, a municipal ordinance declared "that off-street parking facilities are not *public utilities* and not subject to the jurisdiction or control of the city's Public Utilities Commission." (Larsen v. City and County of S. F., supra, 152 Cal. App. 2d at page 367, emphasis *not* added.) No similar excluding statement is present before us now. We do not believe therefore that our opinion in *Larsen* presents an analogy leading to a similar conclusion here that the airport is not a public utility.

City also argues that the Municipal and County Airport Law does not contain a declaration that airports are public utilities. We do not see how such a declaration is necessary, or its omission fatal, to the regulatory scheme here when it is borne in mind that the powers of regulation and control are vested by such act in the City and are in turn vested by the City's charter in its commission having jurisdiction over designated public utilities, including airports. Indeed, we seriously question, although it is not necessary for us here to decide, whether the status of City's airport as a public utility would be destroyed or affected even by the absence of such declaration in its charter, providing that there were found present the necessary characteristics of a dedication of such facility to a public use. (Allen v. Railroad Commission, supra, 179 Cal. 68; Munn v. Illinois (1876) 94 U.S. 113.)

Finally, we feel that the court's conclusion that the airport is a public enterprise but not a public utility, when viewed conceptualistically, is inaccurate. California authorities holding that a municipal airport is a public enterprise (Krenwinkle v. City of Los Angeles (1935) 4 Cal. 2d 611, 614; Pipes v. Hilderbrand (1952) 110 Cal. App. 2d 645, 647) simply decide that in the acquisition and operation of an airport a municipality is acting properly within its powers and not using public funds for a private or commercial purpose. We do not think that the concepts of "public enterprise" and "public utility" are mutually exclusive. A public utility, properly within the ambit of municipal powers, is still a public enterprise. Conversely, the fact that a facility is a public enterprise does not of necessity prevent it from being a public utility.

Giving due and full respect to the caveat found in Allen v. Railroad Commission, supra, 179 Cal. 68 at page 85, that "'[t]o hold that property has been dedicated to a public use is "not a trivial thing" [citation], and such dedication is never presumed "without evidence of unequivocal intention" [Citation].'" we are of the opinion that such intention is here manifest, that the San Francisco airport is a public utility, and its common use facilities a public utility service.

There is no actionable discrimination.

We turn to consider whether Western has any claim of actionable discrimination assertable on the basis of our foregoing conclusions. Western claims that since it was charged substantially higher rates than those

paid by United and TWA under their respective leases for the same common use facilities, there was unjust discrimination as a matter of law. No difference in rates, so it argues, is valid, unless based on a difference in service; no reasonable classification, justifying discrimination, can be based on the time of the commencement of airline operations at the airport; and no differential can find validity in special contracts available to some but not all users of the facilities.

We first dispose of some preliminary matters. To be successful at all, appellant's claims must find legal support under the common law, since we find, applicable to appellant, no statute proscribing the inequality of charges which is the nucleus of its complaint. Provisions of the State Aeronautics Commission Act (Pub. Util. Code §§ 21001-21694) insofar as they require "equal and uniform use" (Pub. Util. Code § 21637) govern airports owned by the State of California and do not apply to City's airport here discussed. Nor does the statement in City's charter (San Francisco Charter § 130) that "[r]ates may be fixed at varying scales for different classes of service or consumers" contain appellant's desideratum of equality. The section, in our view, is permissive in character. It does not demand that all users of facilities be charged equal rates, nor does it proscribe unequal rates, or even give definition to the terms employed.

Next, although Western claims that the rates charged it were unjustly *discriminatory*, it does not claim that they were *unreasonable*, in the sense that they were *excessive*. In fact, Western has conceded here, as well as in the court below, that the rates charged it were, in the above sense, *reasonable*. This is consistent with

its formal pleadings. In its first affirmative defense, found in its amended and supplemental answer, Western alleges that the protested rates are "discriminatory and unjust." Nowhere does it allege that such rates were "unreasonable" or "excessive."

In this state there is no cause of action at common law for damages for discrimination in the absence of allegation and proof that the charges paid by the plaintiff were unreasonable and excessive. Inequality of charges, standing alone, is not per se actionable. (Cowden v. Pacific Coast S.S. Co. (1892) 94 Cal. 470.) In *Cowden*, the complaint alleged that certain freight charges constituted a discrimination against plaintiff, who paid at higher rates than another merchant. The court pointed out that at common law, the common carrier was not under an obligation to treat all customers equally, but only to charge no more than was reasonable, and held that, in the absence of a statute requiring equality, no cause of action was stated. "[T]he court concludes that the complaint is deficient in not stating that the charge to plaintiff was unreasonable; and that the allegation of discrimination or inequality is not the equivalent of an allegation of an excessive charge." (P. 480.)

Appellant urges that the common law rule has been expanded by decisions in other jurisdictions so as to require *equality* as well as *reasonableness* of charge, citing Western Union Telegraph Co. v. Call Publishing Co. (1901) 181 U. S. 92, on writ of error to Supreme Court of Nebraska; and 12 McQuillin, Municipal Corporations (3rd ed. 1950), § 34.99, pp. 309-310. Whatever may be our disposition towards an eclectic consideration of the common law developments

in other jurisdictions, we are of course bound by and must follow the rule announced by the Supreme Court in *Cowden*.

In addition, appellant argues that as interpreted by subsequent California decisions, it is now required in this state *under the common law* that public service charges be equal as well as reasonable and that the rule announced in *Cowden* no longer stands. In support of this position, appellant relies on Nourse v. City of Los Angeles (1914) 25 Cal. App. 384; Hobby v. City of Sonora (1956) 142 Cal. App. 2d 457; and Durant v. City of Beverly Hills (1940) 39 Cal. App. 2d 133. Even if the decisions of the above District Courts of Appeal purported to abrogate or qualify the rule announced in *Cowden*, we would obviously still be bound to follow the Supreme Court opinion in that case. Nevertheless, as we shall show, the foregoing opinions do not change the *Cowden* rule.[20]

The *Nourse* case dealt with a municipal ordinance charging water rates to the property serviced and providing for shut off of supply in the event of delinquencies, irrespective of change of ownership or occupancy. It was held unreasonable and discriminatory as applied to the petitioner who sought to have water supplied after it had been shut off because of the delinquency of a former owner. It was not a rate discrimination case, although the court commented on the city's duty to furnish water to all inhabitants without discrimination.

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[20]Cowden v. Pacific Coast S.S. Co. is cited in Lamb v. Calif. Water & Tel. Co. (1942), 21 Cal. 2d 33, 43, and in Southern Pac. Co. v. California Adjustment Co. (9 Cir. 1916), 237 Fed 954, 959.

The *Hobby* case involved an ordinance imposing an annual service charge on two-family dwellings *outside* city limits for sewer connections with the city's sewage system. The court held that the nonresident plaintiffs had no interest in the city's sewage system, were not part of the public served and that any rights they might have could be predicated only upon a contractual relationship with the city. No question of discrimination properly arose. The rule of *Cowden* was obviously not changed by the case.

In the *Durant* case, the plaintiff, living outside the city limits received water service from a privately owned utility, subsequently acquired by the defendant city, which thereupon charged different rates to consumers inside and to those outside the city limits. Judgment requiring the city to supply water to the plaintiff at the same rates as charged customers within city limits was reversed. From the opinion three possible bases for the reversal appear: (1) That the city by acquiring the private utility assumed a trust to perform its contracts and an obligation to furnish plaintiff water at *reasonable* rates, not necessarily at the same rates paid by residents of the city (It is therefore arguable that the case was disposed of on its particular facts and not on principles of public utility common law.); (2) that a utility may classify its customers on a reasonable basis and charge different rates thereby, the court judicially noticing many reasons which would justify a difference in rates to consumers differently situated; and (3) that in the absence of any showing that rates were unreasonable, unfair or fraudulently or arbitrarily established, the plaintiff had no grounds for relief. Both parties before us in the instant case, not

surprisingly, have relied on *Durant*. Western argues that *Durant* was reversed because the plaintiff failed to prove substantially identical conditions prevailing between residents and nonresidents. City argues that the reversal is based on the failure to prove an unreasonable (i.e. excessive) rate. One thing is clear to us: *Durant* does not eliminate the requirement of alleging and proving an unreasonable rate in order to recover at common law.

Since the uncontradicted evidence shows and the appellant concedes that the rates charged Western were not excessive, Western has no actionable claim of discrimination and under the rule of law announced in *Cowden*, the judgment herein must be affirmed.

Assuming *arguendo* that Western is not precluded from recovery by the rule announced in *Cowden* and that, even though the charges paid by it were not excessive, a cause of action lies for discrimination based on a difference of rates, we proceed to consider whether there was unjust and therefore actionable discrimination under the facts in the record before us.

Whether in particular instances a difference of rates, as between users of a public utility service constitutes unjust discrimination, or whether such difference is justified by the conditions and circumstances attending such use, are questions of fact depending on the matters proved in each case. (Interstate Commerce Commission v. Alabama Midland Ry. Co. (1897) 168 U.S. 144, 170; Barringer & Co. v. United States (1943) 319 U.S. 1, 6; Pennsylvania Co. v. United States (1915) 236 U.S. 351, 361; Western Union Telegraph Co. v. Call Publishing Co., supra, 181 U.S. 92, 103; Postal Telegraph-Cable Co. v. Associated Press (1920)

228 N.Y. 370, 127 N.E. 256, 258.) The trial court found that there was no unjust discrimination in the instant case. Our inquiry then is whether this finding is supported by substantial evidence.

Turning to consider the problem at hand, we cannot ignore its historical antecedents. At the heart of the controversy are the two long-term leases. Proper evaluation of the preferential charges which they embrace and the alleged discriminatory treatment which they generate can only be made in the light of the circumstances and conditions out of which they arose.

As we have pointed out, until Western entered the airport in 1944, United and TWA were the only scheduled air carriers operating from the airport. They had been operating there as the only scheduled airlines since 1932 and 1933 respectively but had not leased any land. It is obvious that in 1940, at the time of United's lease, the airport was still in its infancy. It is also clear that the following ten years were a period of growth and development. Statistics comparing the fiscal year (1939-1940) preceding United's lease with the fiscal year (1950-1951) following the 1951 rate schedule are cogent and compelling: (a) Fixed capital in service increased from slightly less than $3,000,000 to almost $41,000,000; (b) airport passengers increased from approximately 126,000 to approximately 1,700,000; (c) scheduled air movements increased from less than 18,000 to almost 91,000. The record before us is replete with documentary evidence, including maps and photographs, which graphically demonstrate the physical expansion and development of the facilities.

United's first lease in 1940, as we detailed earlier, covered land and administration building space as well

as the common use facilities. It was a part of a program in the moving of United's western district headquarters to the airport. It provided for the construction of capital improvements, to the cost of which, according to a later revision, City agreed to pay $400,000 and United agreed to pay $450,000, plus any excess cost. TWA's lease in 1942, also covered a hangar, shop space, and building space, as well as the common use facilities. In each instance, as we have mentioned, the leases were entered into pursuant to public bidding procedure of the charter. United's second lease in 1947 covered approximately five times as much land as the first lease and, while not eliminating the lease features of the common use facilities, for reasons we have indicated earlier, at least resulted in doubling the rates of the earlier lease and providing for subsequent adjustments at five-year intervals thereafter. There was evidence that United expended approximately $460,000 for improvements under the 1940 lease, and $11,400,000 between 1947 and 1957 under the 1947 lease.

The foregoing leases were thus integrated agreements for the leasing on a long-term basis of land and buildings as well as common use facilities and, in the case of United, for the construction of improvements which would eventually become the property of City. It is apparent that the parties contemplated the expenditure of large sums of money in capital and operating expenses, and the increase of air traffic by the only two scheduled airlines using the airport until Western entered in 1944. Rate provisions for common use facilities contained in the leases cannot be considered separately and apart from the lease agreement as a

whole. It is clear that other considerations moved to City in addition to the amounts paid for such facilities. The leases were instruments skillfully used by City to effect the expansion and development of its airport. To an airport still in infancy and facing the vicissitudes of growth, they offered on the part of its only two important patrons, a long-term guarantee of patronage and support and the commitment of participation in construction of new facilities. To insure for itself such advantages, City elected to proceed by contract rather than by the usual regulatory process in prescribing rates for common use facilities for these two airlines. Its authority to so proceed has been clearly established and each lease entered into by City was "a valid contract expressly authorized by state law." (Trans World Airlines v. City & County of San Francisco, supra, 228 F. 2d 473, 476.)

Nevertheless City's regulatory process remained fully operative as to other users of such common facilities as is seen by the rate schedules adopted by its Public Utilites Commission in 1941, 1946, 1951 and 1954. City thus created two classifications of users of its common use facilities at the airport: One group aiding in the growth and development of the airport, as we have pointed out, occupying and improving *exclusive* facilities and, as an adjunct thereof using *common* facilities; the other group, users of the common facilities only, uncommitted to the occupancy and development of airport land or other permanent facilities. The first group therefore used the common use facilities under *different circumstances and conditions* than the second group. There appears to us to be a logical and rational basis for such classification in the fact that the first

group actively promoted the growth and development of the airport while the second group was under no such obligation. (Cf. Live Oak W. U. Assn. v. Railroad Com., infra, (1923) 192 Cal. 132, writ of error dismissed (1926), 269 U. S. 354.)

The above classifications of airport users and the different methods employed by City to fix rates applicable to each, presented no problems until 1951 because until then the rates applicable to both classes (with the exception of TWA) were the same. It was only when the rates prescribed by each method—contract and regulation—became divergent upon the adoption of the 1951 schedule that we find the classifications challenged. These increased rates were necessary because of increased operating costs and demands for capital investment. There is no evidence in the record that such new rates were not reasonable. Appellant concedes they were reasonable. City attempted by legal action to make such rates applicable to the leaseholders but was unsuccessful. (Trans World Airlines v. City & County of San Francisco, supra, 228 F. 2d 473.) Since, as established by the above case, it had authority in fixing rates to proceed by contract or regulation, we can find no rule of law which compelled it to follow the former course. It is apparent that the City's airport had undergone phenomenal growth and development by 1951. Obviously, it was not necessary for City to resort to the same integrated agreements it found helpful under other conditions.

"It is only unjust or unreasonable discrimination which renders a rate or charge unreasonable; and a utility may, without being guilty of unlawful discrimination, *classify* its customers or patrons on *any rea-*

sonable basis, as according to the purpose for which they receive its service or product, or the quantity or amount received, or the different character of the service furnished, and, subject to the general requirements of reasonableness . . . make separate rates for each class or group, even though there is but one customer included therein." (73 C.J.S., Public Utilities, § 27, pp. 1049-1050, emphasis added; see Durant v. City of Beverly Hills, supra, 39 Cal. App. 2d 133, 139; Live Oak W. U. Assn. v. Railroad Com., infra, (1923) 192 Cal. 132, writ of error dismissed (1926), 269 U.S. 354.)

The trial court heard and examined voluminous evidence dealing with the history of the airport, its growth and development, the purposes and objectives of long-term leases, and the rate fixing policies of the City's Public Utilities Commission. In our view, it could have properly concluded in the light of such evidence that the two classifications of users of the common facilities, which we have set out above, were reasonable and were based on material differences in the conditions and circumstances affecting each group. Stated another way, the court could have properly concluded that the common use facilities of the airport furnished to the above lessees under long-term obligations to sustain and develop the airport were not furnished under the same conditions and circumstances as they were to other users of the airport not under such obligations. Any apparent difference in rates is excused by dissimilar conditions and circumstances. (Barringer & Co. v. United States, supra, 319 U.S. 1; Western Union Tel. Co. v. Call Publishing Co., supra, 181 U.S. 92; Postal Telegraph-Cable Co. v. Associated Press, supra, 228 N.Y. 370, 127 N.E. 256.) The court's finding therefore

of no unjust discrimination is amply supported by substantial evidence.

Western appears to take the position, however, that *considered at any one time* the common use facilities offered by the City to all airlines are precisely the same and, therefore, both the service offered to United, TWA and Western and the conditions under which that service was rendered, were identical. The trial court was not required to dissect a continuum of time and circumstance into separate units or to isolate from their integrated agreements and thus from their proper setting, the clauses therein pertaining to the common use facilities. The trial court was required to examine the problem as a whole and wholly. It would have been meaningless for the court to have confined its attention to the problem, arising for example in 1951, of having different rates fixed by different methods for two classifications of users, without examining the genesis and antecedents of each class to determine the rational basis of the classification. Only by so doing could the court determine whether discrimination was justified or "unjust."

We find nothing in Western's efforts to secure what it refers to as a "lease" which affects or detracts from the trial court's finding on the discrimination issue. The court found that City refused to give Western a long-term lease of the common use facilities.[21] This

[21]The court's finding states in relevant part: "excepting that with respect to the allegation contained in paragraph XIV, to wit, 'that at all times material to this case plaintiff has refused and still refuses to enter into a similar or any contract with defendant,' the Court finds that it is true that defendant demanded and attempted to negotiate a lease with the plaintiff for a fixed term of years for common-use facilities and that plaintiff declined and refused to enter into such a lease."

does not support appellant's theory of discrimination because it is clear from the evidence that Western was not proposing to enter into an integrated type of lease similar to that of United, covering land as well as the common use facilities and providing for expenditures for capital improvements. Western admitted, through its witness Renda, that it was willing to lease hangar space but not land which it would develop. This is borne out by the fact that Western made no attempt to lease the specific lands acquired by United when they were put out to public bid. It is understandable when it is recalled that Western's maintenance base was at the Los Angeles Airport. It could be inferred that Western was not interested in becoming a catalytic in City's airport development. City's 1947 lease with United, on the other hand, can be justified on the basis that City, already bound under the 1940 lease and the lower rate schedule, was successful, through the 1947 lease, not only in leasing additional land and providing for United's construction of substantial improvements thereon but in cancelling the 1941 schedule of rates in favor of the 1946 schedule which doubled the rate.

Appellant contends that any classification between air carriers based on the time they commenced operations at the airport is invalid, relying upon Postal Telegraph-Cable Co. v. Associated Press, supra, 228 N.Y. 370, 127 N.E. 256; and Bradford v. Citizens' Telephone Co. (1910) 161 Mich. 385, 126 N.W. 444. Judge Cardozo stated in the *Postal Telegraph* case that "classes are not 'just and reasonable' when the *only* principle of classification is one of order in time with a resulting division between old customers and new."

(228 N.Y., p. 375, 127 N.E., p. 257; emphasis added.) We have no quarrel with such statement. Here, however, the principle of classification is the difference of conditions and circumstances. The *Bradford* case which condemned classifications of telephone subscribers made on the sole factor of whether they were old or new, is similarly distinguishable from the case before us.

Appellant's argument that special rate contracts do not justify a rate differential unless such contracts are available to all users is not only oversimplified and thus inaccurate but also sought to be applied contrary to the facts in this record. Special rate contracts can justify a differential in rates if customers holding contracts and those not holding contracts are so classified on a reasonable basis under the conditions and circumstances of the particular case. (73 C.J.S., Public Utilities, § 27 pp. 1049-1050, supra; Durant v. City of Beverly Hills, supra, 39 Cal. App. 2d, 133.) Indeed Live Oak W. U. Assn. v. Railroad Com., supra, 192 Cal. 132, upon which appellant relies, does not support appellant's proposition. On the contrary, it upholds a discrimination in rates charged by a public utility water company on the basis of a classification between old users who had contracts with the utility and new users who did not. The following language is pertinent to the case before us: "That there is a logical and natural ground for the classification made by the Railroad Commission seems convincing. A great many of the contract consumers had, in various ways from the beginning of the utility's existence, *aided financially* and otherwise in the *construction* and *maintenance* of the irrigation system by liberal loans of money, ad-

vancements, donations of rights of way, and by making initial payments aggregating large amounts for water rights. . . . ." (192 Cal. 132 at p. 140; emphasis added.) Nor does appellant's citation of section 532 of the Public Utilities Code[22] support its above argument, since, as we have shown, such provisions of the code apply only to *privately* owned public utilities. (Los Angeles Met. Transit Authority v. Public Utilities Com., supra, 52 Cal. 2d 655, 661.)

Since we conclude that there is no actionable discrimination, we deem it unnecessary to consider City's contention that Western has failed to show any damage apart from the differential in rates.[23]

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[22]Section 532 provides in relevant part that "Except as in this article otherwise provided, no public utility shall . . . extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons. The commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility."

[23]For this proposition, City relies on I.C.C. v. United States (1933), 289 U. S. 385, 389-392, where Mr. Justice Cardozo declared that when *discrimination* alone is the gist of the claim and a party who has paid only the *reasonable* rate sues upon a discrimination because some other party has paid less, "the difference between one rate and another is not the measure of the damages. . . . He is to recover the damages that he has suffered which may be more than the preference or less. . . . The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less. . . . For all that appears the prices charged for lumber by producers within the group were the market prices current generally throughout the entire field of competition. [Footnote omitted.] If that is so, the producers in the favored territory were not making use of the preference to mark the price down to an equivalent extent, and thus deprive the complainant, less favorably situated, of a reasonable return. They were letting the price stand as it would have been if the tariff had been equal, and taking advantage of the preference to increase the profit for themselves. That was gain to them but it was not

The 1951 schedule of rates was validly adopted.

Finally appellant contends that the 1951 schedule of rates was not validly adopted as a result of which the 1946 schedule remained in effect until the effective date of the 1954 schedule on September 1, 1954.[24]

Section 130 of City's charter provides that should the Public Utilities Commission, in fixing rates for a utility, propose a so-called "deficit schedule," that is one which shall not produce revenue sufficient to pay operating expenses and other designated charges, for at least the *succeeding fiscal year,* it may do so *with the approval* of the board of supervisors by a *two-thirds vote.* The section also provides that an ordinary, that is nondeficit, schedule becomes effective unless a two-thirds majority of the board *rejects* it; upon failure of the board to act within 30 days in such latter case, the schedule becomes effective.[25]

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loss to the complainant. . . . There would be no necessary correspondence between preference and damage."

We have not been referred to, nor have we found, any California case which passes on the question. In reply, Western's position is that the parties before us have by stipulation agreed that the recoverable sum is the amount of the protested rates. As noted in our opinion, we do not decide the above point.

[24]Appellant does not question the valid enactment of the 1954 schedule. Hence only the protested rates chargeable to the period January 1, 1951, through August 31, 1954, are here involved.

[25]Section 130 in relevant part provides: "Rates for each utility shall be so fixed that the revenue therefrom shall be sufficient to pay, for at least the *succeeding fiscal year,* all expenses of every kind and nature incident to the operation and maintenance of said utility, together with the interest and sinking fund for any bonds issued for the acquisition, construction or extension of said utility; provided that, should the commission propose a schedule of rates, charges or fares for said utility which shall *not produce such revenue,* it may do so with the approval of the board of supervisors, by a *two-thirds vote* and it shall thereupon be incumbent to provide by tax levy for the additional amount necessary to meet such deficit. All other changes in rates, charges or fares as proposed by the commission shall be submitted by the

As noted earlier, the 1951 schedule was approved by the board of supervisors by a seven-aye, three-no, and one absent vote. Since the board is composed of eleven members and under the charter (San Francisco Charter § 19) a two-thirds vote means two-thirds of all the members, such an approval would require eight-aye votes. The trial court concluded that the 1951 schedule "was legally and lawfully adopted by said [public utilities] commission" and "was legally and lawfully approved" by the board of supervisors.[26] The main question for our determination therefore is whether the schedule was a so-called "deficit" schedule or not.

The record discloses the following facts: On October 5, 1950, the manager of utilities submitted to the Public Utilities Commission a proposed schedule of rates and charges together with a statement comparing the proposed rate and charge structure and revenue estimates with existing rates and charges. This comparison showed that, predicated on then existing traffic volume and occupancies, the net increase would be $140,475 per year. The report showed an estimate deficit of $87,437 under proposed rates as contrasted with an estimated deficit of $227,911 under existing rates. The above-mentioned letter of the manager of utilities is si-

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commission to the board of supervisors for approval, and, except as in this section otherwise provided, *it shall require a two-thirds vote* of the board of supervisors to *reject* the rate changes as proposed by the commission, and if so rejected, such proposed changes in schedules of rates, charges or fares shall be returned to the commission for revision. If the supervisors shall *fail to act* on any such proposed schedule within thirty days, the schedule shall thereupon *become effective*." (Emphasis added.)

[26]The memorandum opinion of the trial judge indicates he felt that there was no evidence that the 1951 schedule would produce a deficit in the succeeding fiscal year, that is, July 1, 1951, to June 30, 1952.

lent as to the fiscal year of which it is speaking but the statement of comparison of estimates of revenue and expenditures clearly refers to the fiscal year 1950-1951. Thus, such evidence showed that the proposed schedule of rates would produce a deficit in the *same* fiscal year, not in the *succeeding* fiscal year. No evidence showed that a deficit would be produced in the *succeeding* fiscal year, that is, the fiscal year July 1, 1951, to June 30, 1952.

On November 20, 1950, the Public Utilities Commission adopted the above-mentioned proposed schedule. (S.F. Pub. Util. Com. Res. No. 11,182.) Approval by the board of supervisors followed on December 18, 1950. Neither the resolution of the Commission nor the board refers to any dates. The record before us contains no other evidence as to the proceedings before the commission or the board. Since approval by the board of supervisors was not by two-thirds vote, it is implicit in the trial court's conclusion of legal and valid adoption and approval, that it found the 1951 schedule to be a *normal* schedule rather than a *deficit schedule*. It is clear that it could not be a deficit schedule because it did not show a deficit for the "succeeding fiscal year." The case of Hurst v. City & County of San Francisco (1949) 33 Cal. 2d 298, 302, in construing section 130 of the San Francisco Charter states: "There can be no doubt that the reference to the 'succeeding fiscal year' in section 130 for which a fare shall be fixed at least equal to the operating expenses, means the next complete fiscal year after the date the schedule is fixed rather than the rest of the fiscal year in which the rate is established." (P. 302.)

Appellant argues that the forecasts made and submitted by the manager of utilities when coupled with the airport's history of deficit operations[27] make it clear that the Public Utilities Commission adopted a deficit schedule within the ambit of section 130 of the charter. Appellant concedes that the estimates here in controversy referred to the fiscal year 1950-1951 (in other words, the same fiscal year) but argues that such annualized and adjusted figures predicated on traffic and conditions at the airport in October 1950, were actually the basis for estimating needs for the fiscal year 1951-1952. Thus, they were intended to show and did show an estimated deficit "for 'at least' the succeeding fiscal year."

There is no evidence in the record to support appellant's argument. The commission might not have intended at all to use the 1950-1951 estimates in the way urged by appellant. The estimates did not refer to the next succeeding fiscal year. It was appellant's burden to show that they did. Western introduced no evidence as to what was presented to the board of supervisors on December 18, 1950, at the time the 1951 schedule of rates was submitted for approval. Moreover the resolution of the Public Utilities Commission directed that "said schedule of San Francisco Airport Rates and Charges be submitted to the Board of Supervisors for approval as required by Section 130 of the Charter and that, when approved, either expressly, or by *operation of law*, said Schedule of Rates and Charges go into effect commencing with the first day

[27]The airport showed a deficit in every year prior to the 1951 schedule. In all fiscal years 1938-1939 through 1949-1950 City made substantial contributions from general tax funds to defray deficits, totaling $10,654,955.88 for the 12 fiscal years.

of January, 1951." (Emphasis added.) In our view this indicates that the commission did not consider that it was submitting a schedule which was a deficit schedule within the meaning of section 130. If it had been a deficit schedule, it could have been approved only by a two-thirds vote of the board of supervisors. Only a nondeficit schedule could have become effective "when approved, either expressly or *by operation of law*," that is, by the failure of the supervisors to act within 30 days.

The resolution of the board (Res. No. 10628, Series of 1939) approving such schedule is in the record before us, bearing the certification of the clerk of the board "that the foregoing resolution was adopted by the Board of Supervisors of the City and County of San Francisco at its meeting of Dec. 18, 1950." It is presumed that the board regularly performed its official duty and carried out all procedures necessary to the full and proper approval of the schedule submitted to it. (Code Civ. Proc., § 1963, subd. 15; Bringle v. Board of Supervisors (1960) 54 Cal. 2d 86, 89; Miller v. Planning Commission (1956) 138 Cal. App. 2d 598, 602-603.) Such a presumption is evidence. (Smith v. Smith (1958) 157 Cal. App. 2d 658, 662.)

Appellant argues, however, that a certain item of documentary evidence (*Plaintiff's* Exhibit 72) would prove conclusively that the 1951 schedule of rates was proposed as a deficit schedule and that the trial court erred in excluding it. The salient facts are ironic. The exhibit in question is an opinion of respondent's

city attorney given in answer to a request by respondent's controller.[28] It bears date of December 29, 1950. 11 days after the board of supervisors approved the 1951 rate schedule. The exhibit was offered by *respondent*, *objected* to by *appellant*, and finally excluded by the trial court which *sustained appellant's objection* thereto.[29]

Appellant argues that if the exhibit was objectionable at all, it was on the ground of hearsay and, since no *special* objection was made by appellant on that ground, appellant's general objection, if it made one, was insufficient to raise the hearsay objection, relying

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[28]The city attorney's opinion (Opinion No. 313) quotes the controller's request for an opinion. This quoted material in turn refers to a purported admission of the Public Utilities Commission. The quoted material which appellant seeks to utilize as evidence is as follows: "'The Public Utilities Commission, in making its presentation to the Board of Supervisors, admitted that the schedule of rates and charges for the San Francisco Airport, as proposed under its Resolution No. 11,182, would not be, to use the language of Charter Section 130, "sufficient to pay for at least the succeeding fiscal year, all expenses of every kind and nature incident to the operation and maintenance of said utility, together with the interest and sinking fund for any bonds issued for the acquisition, construction or extension of said utility * * *."'"

[29]On the last day of the trial respondent's counsel indicated City would offer the opinion as an administrative ruling showing that on the basis of a city attorney's opinion, the supervisors vote on the 1951 schedule was valid. Appellant's counsel questioned whether an opinion was evidence. The court observed that when filed, the offered exhibit, like others discussed, would be marked for identification subject to the objection of appellant's counsel. This was pursuant to a prior ruling of the court under which various exhibits were to be so marked and their admissibility in evidence subsequently argued by counsel for the parties. The exhibit was finally filed with the court during the oral argument, which occurred some six months after the trial. At that time, upon the court's inquiry of counsel as to whether there was an objection to the document, one of appellant's counsel stated that there had been an objection previously by another counsel of appellant.

upon Rupp v. Summerfield (1958) 161 Cal. App. 2d 657, 662. As a result appellant takes the position that it is not here precluded by any objection in the record, from challenging the trial court's exclusion of the exhibit.

It is clear to us that appellant's counsel made an objection to the exhibit. Since the objection did not specifically state the grounds or specify the particular defect, it was a general objection. The rule is settled that a general objection will not raise on appeal the point of erroneous *admission* of evidence on the specific grounds that it was hearsay. Such an objection constitutes waiver of the defect. (Witkin, California Evidence, §§ 700-703, pp. 732-736; Rupp v. Summerfield, supra, 161 Cal. App. 2d 657.) The above rule does not apply to the *exclusion* of evidence. When evidence is *excluded* upon a mere general objection, the trial court's ruling will be upheld if any ground exists for the exclusion (1 Wigmore, Evidence (3d ed. 1940), § 18, pp. 332-338; McBaine, California Evidence Manual, § 1494, p. 537). The document in question is clearly hearsay. Paraphrasing Wigmore, this "valid ground was apparent to the judge without express statement." (Wigmore, supra, p. 338.) The trial court did not err in rejecting the exhibit in question.

We are of the opinion therefore that the conclusion of the trial court that the 1951 schedule of rates was legally and lawfully adopted by the Public Utilities Commission and was legally and lawfully approved by the board of supervisors is supported by the record and must be upheld. We therefore deem it unnecessary to consider other contentions made by City in support of its position on this issue.

We therefore hold that Western has no actionable claim of unjust discrimination for the recovery of charges paid by it under protest, based upon the Federal Airport Act of 1946 or upon any of the assurances or agreements made by City to the federal government pursuant to such act or other federal acts; that Western has no such actionable claim under principles of public utility law assertable upon the basis, as we so conclude, that City's airport is a public utility and the common use facilities thereof are a public utility service; that the 1951 schedule of rates for the airport was validly adopted and approved; and that all charges made for such facilities against Western during the period here involved were legally and properly made, received and retained by City.

The judgment is affirmed.

Sullivan, *J.*

We concur:

Bray, *P. J.*

Tobriner, *J.*

Memorandum Opinion of California Superior Court.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

City and County of San Francisco, a municipal corporation, Plaintiff, vs. Western Air Lines, Inc., a Delaware corporation, Defendant. No. 414510.

In view of the obvious importance of this case, the Court deems it desirable to set forth a brief history of the pertinent facts of this litigation. In the year 1940, and for a number of years prior thereto, the San Francisco Airport, owned and operated by the City and County of San Francisco, hereinafter referred to as City, was serviced regularly by only two scheduled airlines i.e., United Airlines, Inc. and Trans World Airlines, Inc., hereinafter referred to as United and TWA, respectively. In 1940 the City entered into a lease with United demising certain premises and specific airport facilities for a term of twenty years; and in 1942 entered into a substantially similar lease for a like term with TWA. Both of said leases provided, among other things (not germane to this discussion) for the payment of certain charges and rates for "common use facilities" i.e., those used in common by all airlines such as landing areas, runways, aprons, taxi-ways, water facilities, lights, etc. This litigation involves only the rates charged for common use facilities.

In 1944 Western Air Lines hereinafter referred to as Western, became a user of the airport under a revocable permit authorizing it to utilize the "common use facilities" for which it was charged rates pursuant to a sched-

ule which had been adopted by the City in 1941, and which rate was the same as that charged United and TWA under the said leases. As a matter of fact all airlines paid the same rates for common use facilities between the years 1940 and 1946.

In 1946 the City adopted a new schedule of rates for these facilities whereby the charges were approximately doubled. These new rates were paid by all airlines excepting United and TWA who continued to pay the rates provided for in their respective leases. In 1947, however a new lease was entered into between the City and United for a period of 40 years, the terms of which apparently susperseded the 1940 lease. Under this latter lease United agreed, among other things, to lease seventy-five acres in addition to the fifteen previously leased; it agreed to pay the rates under the 1946 schedule with a provision for a ten per cent increase every five years; and it agreed to erect and make certain capital improvements which would revert to the City at the termination of the lease. Thus, from 1946 to 1951 all airlines except TWA paid the same rate for common use facilities.

The City in 1951 and again in 1954 increased the rates for these facilities. Western was billed for these charges, and it has paid under protest for the period from January 1, 1951 to August 31, 1957, the difference between the 1946 rates and those established in 1951 and 1954. Specifically, this amounts to the sum of $214,385.74 which is the subject of this litigation. The City is suing to retain this sum paid to it under protest, and Western has counterclaimed for its refund. During said period from January 1, 1951 to August

31, 1957 TWA has continued to pay the 1941 rates set by its lease, and United has paid the 1946 rates plus an increase of ten percent in 1953.

After the 1951 rates were promulgated the City sought to impose them upon TWA and it was enjoined from doing so by a judgment in the Federal Court which upheld the validity of the 1942 lease. (TWA v. City and County of San Francisco, 228 Fed. (2) 473). Upon the rendition of said judgment the City dismissed a suit which it had likewise filed against United for the payment of rates under the said 1951 schedule.

From 1944 to the present time Western has intermittently demanded and attempted to negotiate, a lease for a fixed term of years for common use facilities, but the City has declined to enter into such a lease.

The respective positions of the parties are as follows:

Western contends that it is being discriminated against, and in this respect maintains that its rates should be the same as those paid by United under the 1946 schedule and fixed by its lease. No allegation of discrimination is made as to the rates paid by TWA. It is further urged that the 1951 schedule of rates were illegally adopted.

Western makes four principal points in its presentation, to wit:

(1) The San Francisco International Airport is a public utility and the furnishing of common use facilities in connection therewith is a public utility service; that consequently the rates and charges paid under protest are unjustly discriminatory and legally unenforceable under established principles of public utility law.

This contention is founded on the premise that there can be no discrimination in rates as between those who make use of the facilities.

(2) The rates and charges paid under protest are unjustly discriminatory and legally unenforceable because they are in violation of agreements entered into by the City with the Federal Government to induce the grant of Federal funds for the development of the Airport. This contention is based on the premise that Western is a third party beneficiary to these agreements wherein the City gave assurances to the Federal Government that it would maintain and operate the Airport "without unjust discrimination."

(3) The 1951 Schedule of rates was illegally adopted by the City because the said schedule proposed by the Public Utilities Commission to the Board of Supervisors did not receive the required approval by a two-thirds vote of the Supervisors as required by Section 130 of the Charter. The contention is made on the premise that the Schedule was purportedly approved by a vote of seven members of the Board when a minimum of eight was required.

(4) The charge for "Professional Fire Protection Service" at the rate of $2400.00 per year included as a charge in the 1951 Schedule of Rates and included within the amount paid under protest herein is not a proper charge.

The City, on the other hand, contends: (a) that the Airport and its common use facilities are not a public utility; (b) that the rates involved in this litigation are covered by the 1954 Schedule of Rates as well as those provided in the 1951 Schedule; (c) that these rates are

fair and reasonable and are not unjustly discriminatory as to Western under public utility law, California law, or pursuant to the Agreements entered into with the Federal Government under the Federal Airport Act and other contracts for the grant of federal funds for the development of the airport; (d) that these rates are lawful; (e) that a two-thirds vote of the Board of Supervisors was not required for the adoption of the 1951 Schedule of Rates and Charges; (f) that Western is precluded from attacking the legality of the 1951 rates under principles of estoppel, by the pre-trial conference order herein, because of a failure to plead illegality in its answer, and because a collateral attack will not lie as to the determinations of the Board of Supervisors; (g) that the fire protection charge is proper and reasonable; and (h) that, in any event, Western has failed to show that it has been damaged.

PUBLIC UTILITY ISSUE

Although there is some authority in other jurisdictions to the effect that an airport is a public utility, we are of the opinion that this is not the law in California. There is nothing in the Constitution or the statutory law of this state which declares an airport to be a public utility; nor have any of the decisions of our higher courts so declared. Our courts have gone no further than to declare an airport to be a public enterprise. Western argues that the cases of *Krenzwinkle v. The City of Los Angeles*, 4 Cal. (2d) 611; *Pipes v. Hilderbrand*, 110 Cal. App. (2) 645 and *Coleman v. The City of Oakland*, 110 Cal. App. 715, are authority for the proposition that the maintenance and operation of an airport and its facilities is a public utility. The *Kren-*

winkle and *Pipes* cases go no further than to state that the acquisition, conduct and maintenance of an airport is a public enterprise; the *Coleman* case only stands for the proposition that the operation of an airport constitutes a proprietary function. None of these cases indicate that an airport is a public utility. There is language in two other cases which lead me to believe that the maintenance of an airport is not a public utility, to wit, *City of Whittier v. Dixon*, 24 Cal. (2d) 664, and *Larson v. City and County of San Francisco*, 152 Cal. App (2d) 355. In both of these cases, which cite the *Krenwinkle* case, courts in describing public parking places and facilities as a public enterprise, have used this language.—"Public parking places serve a public purpose. They may be *compared to municipal* airports which have been recognized as public improvements." The *Larson* case in holding that a public off-street parking facility provided for under the auspices of the Parking Authority of the City and County of San Francisco is not a public utility uses this significant language.: "Neither the Charter, any legislative act nor the Constitution has defined off-street parking as a public utility." We believe that the analogy can be drawn between the *Larson* case and the instant case.

It should be noted, too, that the construction, maintenance, and operation of an airport by a municipality has been provided for by the State Legislature by virtue of the Municipal Airport Law. (Government Code 50470 et seq.) This state enactment does not declare an airport to be a public utility. There is authority for the proposition that public utility status is created only by a manifestation of clear intent to do so. (*Allen v. Railroad Commission*, 179 Cal. 68.) The Municipal Airport

Law has been held to have preempted the field of municipally owned and operated airports which have been declared not to be strictly local or municipal affairs, but subject to state law. (See *TWA v. City and County of San Francisco, supra*). Accordingly, any provision or enactment by local law or charter covering municipal airports inconsistent with or repugnant thereto is superseded by the Municipal Airport Law. Furthermore, in the opinion of this Court, the Charter provisions relied upon by Western, to wit, Sections 121 and 122, do not lead inexorably to the conclusion that the airport is a public utility. A more reasonable interpretation of these Charter provisions is that the airport is not classified as a public utility but merely placed under the jurisdiction of the Public Utilities Commission. It should be likewise noted that the provision of the Constitution and the Public Utilities Code are applicable only to private individuals or corporations engaged in public utility services and not to municipally owned or operated public utilities, and consequently have no bearing on the issues involved in the case at bar.

THE DISCRIMINATION ISSUE

If our determination of the public utility issue is correct Western cannot complain that it has been subjected to unlawful discriminatory charges, for if the airport is not a public utility the City may charge any reasonable rate. Western has stipulated in this case to the fact that the rates set by the 1951 and 1954 schedules are reasonable. Its complaint is that while the rates are reasonable it has been unjustly discriminated against under public utility law because the City is

charging lower rates to TWA and United under their leases.

Assuming arguendo that the airport is a public utility, can the City impose different rates upon separate users of the same facilities? The City contends that under the common law of the State of California and under principles of public utility law it can do so, relying on *Cowden v. Pacific Coast Steamship*, 94 Cal. 470, and *Durant v. City of Beverly Hills*, 39 Cal. App. (2) 133. The contention of Western is based upon authorities which hold that under the common law as interpreted by various state and federal cases that hold that only one rate may be charged for the same service under similar circumstances and conditions. It is the opinion of this Court that it is not necessary for it to reconcile the purport and effect of the common law as urged by the respective parties because this question has been finally decided in *TWA v. City and County of San Francisco*, supra. The plain import of the *TWA* case adjudicating the validity of the same TWA lease mentioned above, is that by virtue of the Municipal Airport Act, supra, the maintenance of a municipal airport is not a municipal affair but subject to state statutes which supercede common law doctrines. It was held therein that the City had the authority under the Act to proceed to set rates by contract or by regulation; and that when it elected to proceed by contract, the effect was to suspend, during the life of the contract, the governmental power to fix or regulate rates. It is further held therein that the Act enabled the City to enter into leases or contracts with a single customer (Government Code Section 50474), but it does not follow as Western contends, that any failure to enter into any

other contract or lease amounts to discrimination. In our opinion the statute contains no mandate that all customers be charged identical rates regardless of the circumstances surrounding the lease or contract. The reasonable interpretation of the statute in the light of the *TWA* case is that the City may contract or lease as it deems fit and that such conduct does not amount to discrimination.

Western takes the further position that it has proven unjust discrimination by the City in violation of the City's agreements with the Federal Government. This argument is premised on the theory that the agreements between the City and the Government under the Federal Airport Act, 49 USC 1110 and prior thereto, are made for a class of third party beneficiaries of which Western is a member. Under these contracts the City agrees that "it will keep the airport open to all types, kinds, and classes of aeronautical use without discrimination between such types, kinds and classes" and further the City must agree that it will "operate the airport for the use and benefit of the public, on fair and reasonable terms, without unjust discrimination." Section 11 Federal Airport Act, supra. The City must further agree to charge "fair, reasonable, and nondiscriminatory prices." Western further argues that the use of the term "public" in the Act refers only to firms and persons operating aircraft.

The City, on the other hand, says that the Act contemplates simply a bi-lateral contract with mutual benefits and burdens between the parties and no other individual is intended to be benefited.

It is readily apparent that the intent of the National Airport Act was to set forth a system for the development of various airports in the United States. Nothing in the statute or in the cases cited by Western leads this Court to the conclusion that the Act vests any private cause of action in the defendant, nor is the Court able to glean any intent that the contracts executed under the statute were designed to benefit the airline industry. The Act is silent on the propriety of the City entering into leases but the state statute patently recognizes that power. The Court is also unable to adopt Western's viewpoint in this regard for the reason that it is contrary to the general law. A contractor with the United States even if his contract is to render public service, does not bind himself to all the public. *Restatement of Contracts*, Section 145; *Ukiah v. Ukiah Water Co.*, 142 Cal. 173. It is manifest that the statute under which Western seeks to enforce its alleged rights is not made for the benefit of the airline industry solely, but for the general public. The narrow interpretation placed on the enactment by Western must be rejected.

Still another reason militates against defendants' position. It is apparent that entering into leasehold arrangements with airlines is a normal and customary manner of doing business in the airport industry. Presumably Congress was aware of this when the statute was enacted. To adopt plaintiffs' interpretation would mean that as soon as a lease was executed it would automatically gear all rates to those of the lease regardless of any other consideration the parties may have had in mind. This is an obviously incongruous result, and to reach it we must be convinced that that was the

precise Congressional intent. We are not so inclined. What has been stated above as to contracts between the City and the Federal Government entered into pursuant to the provision of the Federal Airport Act would logically apply with equal vigor to those contracts between the City and the Federal Government executed prior to enactment of that statute.

THE 1951 SCHEDULE OF RATES

Western challenges the validity of the 1951 Schedule of Rates on the ground that said rates were not legally adopted in accordance with Section 130 of the Charter. No attack is made on the validity of the 1954 Schedule. As to this issue, then, we are concerned only with the rates from January 1, 1951 to September 1, 1954.

The City contends that Western is estopped from raising this issue for the following reasons: that it is precluded from doing so by virtue of the pre-trial order; that the issue has not been timely raised; that the failure to raise the issue in its first answer herein constitutes an admission that the rates were legally adopted; and that it cannot collaterally attack the action of the Board of Supervisors. In the opinion of this Court none of these grounds is tenable.

Section 130 of the Charter of the City and County of San Francisco provides that when the Public Utilities Commission proposes a schedule of rates for any utility (without limitation as to public utilities) and the said schedule of rates will not produce a revenue sufficient to pay, for at least the succeeding fiscal year, all expenses of every kind and nature incident to the operation and maintenance of said utility, together with the interest and sinking funds for any bonds issued for the

acquisition, construction or extension of said utility, it may do so with the approval of the Board of Supervisors by a two-thirds vote of said Board. It should be noted that said two-thirds vote is required only in the situation where the proposed rate will produce a deficit in *the next ensuing fiscal year*. Section 130 further provides that in order to reject any other schedule of rates a vote of two-thirds of the Board of Supervisors is required, and if the supervisors fail to act within thirty days the schedule shall thereupon become effective.

In the case at bar, the evidence shows that the 1951 schedule of rates was acted upon by a vote of 7 ayes, 3 noes, and 1 absent. Under Charter Section 19 a two-thirds vote requires an affirmance of two-thirds of the entire membership of the board regardless of how many are present. The board of supervisors being comprised of eleven members, two-thirds of the total membership would require eight votes.

There is no evidence before this Court that the schedule of rates proposed by the Public Utilities Commission to the Board of Supervisors, pursuant to a resolution adopted by it on November 20, 1950 to become effective on January 1, 1951, would produce a deficit in the succeeding fiscal year i.e., July 1, 1951 to June 30, 1952. The evidence only shows that the proposed schedule would produce a deficit in the fiscal year July 1, 1950 to June 30, 1951, or in other words, in the same fiscal year that the schedule was proposed and adopted. (See Plaintiff's Exhibits 44, 45 and 46.) Under the authority of *Hurst v. City and County of San Francisco*, 33 Cal. (2d) 298, a two-thirds vote of the board of super-

visors is not required under these circumstances, and a majority vote suffices to legally adopt the schedule.

The Court has also considered the claim of Western that the charges made for professional fire protection services at the airport are illegal and improper. These charges were included in the 1951 schedule of rates above found to be lawfully promulgated, and they are proper and reasonable in the light of evidence adduced at the trial.

In view of the foregoing, judgment is awarded to the plaintiff City for the sum of $214,385.74 heretofore paid by the defendant to the plaintiff under protest. Counsel for the plaintiff is directed to prepare findings of fact and conclusions of law consistent with views expressed herein.

Dated: December 5, 1958.

JOHN B. MOLINARI,
Judge of the Superior Court.

Judgment of California Superior Court.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

City and County of San Francisco, a municipal corporation, Plaintiff, vs. Western Air Lines, Inc., a Delaware corporation, Defendant. No. 414510.

This cause came on regularly for trial on the 6th day of January, 1958, and continued on January 7, 8, 9, 10 and 13, 1958, before the Honorable John B. Molinari, presiding without a jury; plaintiff appeared by its attorneys, Dion R. Holm, City Attorney of the City and County of San Francisco, through Thomas M. O'Connor, Public Utilities Counsel, Robert M. Desky, Deputy City Attorney, McMorris M. Dow, Deputy City Attorney, and by Harold C. Faulkner, Esq., and defendant appeared by its attorneys Messrs. Darling, Shattuck & Edmonds, through Douglas L. Edmonds, Esq., and Donald Keith Hall, Esq., and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the matter having been orally argued on August 11, 1958, and submitted to the Court for its decision, and the Court being fully advised in the premises and having rendered its Memorandum Opinion and an order for judgment on December 5, 1958, and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith; NOW, THEREFORE, by reason of the law and findings aforesaid,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the sum of $214,385.74 paid under protest pursuant to stipulation and now on deposit with plaintiff, is due and owing to plaintiff from defendant.

2. That plaintiff is entitled to the unconditional ownership and full beneficial use of said sum of $214,385.74, free of any claim thereto, or any part thereof, of defendant.

3. That defendant take nothing under its amended and supplemental answer, or under any of the affirmative defenses or the counterclaim alleged therein.

4. That the plaintiff do have and recover from defendant its costs in this action amounting to the sum of $.....

Dated: This 6th day of May, 1959.

JOHN B. MOLINARI,
Judge of the Superior Court.

Filed May 6, 1959. Martin Mongan, Clerk. By R. J. Tracey, Deputy Clerk.

FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 542

WESTERN AIR LINES, INC.,

Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District.

REPLY BRIEF OF PETITIONER.

HUGH W. DARLING,
DONALD K. HALL,
523 West Sixth Street,
Suite 737,
Los Angeles 14, California,
Attorneys for Petitioner.

Of Counsel:

DARLING SHATTUCK, HALL & CALL,
523 West Sixth Street,
Suite 737,
Los Angeles 14, California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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REPLY BRIEF OF PETITIONER.

1. Respondent's main contention is that it was decided below on the evidence — both under California law and under the Federal Airport Act and respondent's agreements with the United States — that there was a difference in conditions justifying the difference in rates. It is urged that this factual determination is dispositive of the entire matter.

As allegedly demonstrating that such a factual determination was made by the trial court, respondent quotes portions of Conclusion 7 of the trial court's Conclusions of Law [Br. pp. 2-3; Clk. Tr. p. 61]. On the contrary the trial court paid no heed to the claim of a difference in conditions justifying the difference in

rates. It held simply that the California Municipal and County Airport Act, Cal. Gov. Code §§50470 *et seq.*, as interpreted in *Trans World Airlines v. City and County of San Francisco*, 9th Cir., 228 F. 2d 473, cert. den., 315 U. S. 919, authorized respondent to "contract or lease as it deems fit and such conduct does not amount to discrimination" and that neither the Federal Airport Act nor respondent's agreements with the United States vested petitioner with any right of action for unjust discrimination [Pet. App. pp. 67-70]. The California District Court of Appeal, in affirming the judgment of the trial court on the issues raised under California law, assumed that the trial court "could have properly concluded" from the evidence that there was a difference in conditions justifying the difference in rates [Pet. App. p. 47]. But that assumption was not made an alternative of its decision that petitioner had no rights under the Federal Airport Act and respondent's agreements with the United States [Pet. App. pp. 12-26, 42].

In all events, the facts underlying the discrimination issue and the claimed justification for the difference in rates are uncontradicted in the record.[1] Like the public utility issue, on which the California District Court of Appeal overruled the trial court, the issue of whether the difference in rates was justified by a difference in

[1]It was stipulated that at all times material to this controversy the "common facilities" for the use of which the rates in question were charged were the same for each airline utilizing the Airport [Clk. Tr. p. 29]. No difference was claimed to exist in such facilities, or the expense of providing such facilities, as among the carriers involved here. The content of the evidence as to the exclusive occupancies at the Airport, the commitments with respect thereto and the Airport's growth and expansion was admitted. Its materiality was all that was disputed.

conditions, "involving no evidentiary conflict, presents a question of law" reviewable in this Court [*cf.* Pet. App. p. 27].[2]

2. The meaning and effect of the Federal Airport Act and respondent's agreements with the United States are Federal questions of nationwide consequence to be determined under authoritative decisions of this Court. No concept or relationship rooted in local law is involved, as singularly demonstrated by the holding below that there is no California common law rule against unjust discrimination in public service [Pet. App. pp. 39-40]. The cases cited by respondent (Br. p. 11, fn. 5) to the effect that the content of a Federal right at times may be dependent on state law are clearly inapposite.

If petitioner has a right of action under or by virtue of the Federal Airport Act or respondent's agreements with the United States, the applicable principles for determining the issue of unjust discrimination are declared in *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92. ". . . [A]ny difference in charge which is not based upon [a] difference in serv-

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[2] *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, is not to the contrary. There a difference was shown to exist in the conditions under which the telegraphic services were rendered involving the nature and expense of performing the services. The jury was charged that if such difference fairly justified the difference in rates, there was no unjust discrimination. If the difference in rates was found to be disproportionate to the difference in conditions, there was unjust discrimination to the extent of such disproportion. *Id.*, at 97. The evidence as to what extent, if any, there was such disproportion was conflicting. The sufficiency of the evidence to support the Nebraska jury's verdict was held not to be subject to review in this Court. *Id.*, at 103.

ice" is forbidden. *Id.*, at 100. As put by the trial court in that case, a difference "in conditio[n]s affecting the difficulty or expense of performin[g] the service" must exist to justify a difference in the rates for the service. *Id.*, at 97. That there was no difference in the service or the conditions affecting the difficulty or expense of performing the service in the instant case is without dispute. It was stipulated.

Respondent footnotes (Br. p. 8) the recent case of *Board of County Commissioners v. Aerolineas Peruanas, S.A.*, 5th Cir., 307 F. 2d 802, reversing *Aerovias Interamericanas de Panama, S.A. v. Board of County Commissioners*, U. S. D. C. S. D. Fla., 197 Fed. Supp. 230. That case concerned the rights of certain foreign air carriers under the favored nation clause in the Convention on International Civil Aviation, 61 Stat. 1180, which declares that the public airports of each contracting State shall be open under uniform conditions to aircraft of the other contracting States, at no higher charge than paid by its aircraft engaging in similar operations. The contractual principles which measure such rights and which permit exceptions to such clauses made for valuable consideration have no application here.

The airport lease agreements which were there involved, moreover, were offered to all carriers utilizing the airport and involved provisions under which the carriers who accepted and became lessees underwrote the cost of operating the airport. The Administrator of

Civil Aeronautics, in the letter quoted by the Fifth Circuit (307 F. 2d 805-806, fn. 3), justified the lower rates to the lessees on these grounds, among others.

The facts of the instant case are not comparable. United Air Lines was given a 40-year lease incorporating rates for the common facilities. Petitioner was not concurrently offered and in fact was refused a similar integrated lease for any term of years. The only alleged special considerations are that United leased 75 acres of land at the Airport and agreed to construct a maintenance base on such land for its private and exclusive use. But these are not considerations affecting the common facilities or the cost of operating the common facilities, and neither United nor T.W.A. agreed to underwrite the operation of the Airport. That petitioner had no need for private facilities at the Airport which were as extensive as United's cannot justify the higher public service rates which it was charged.[3]

3. There is no question here of applying the civil sanctions of a distinct statute, as in *Nashville Milk Co. v. Carnation Co.*, 355 U. S. 373, nor does this case concern a regulatory scheme and impasse such as involved in *T.I.M.E. v. United States*, 359 U. S. 464. Respondent's reliance on those cases is misplaced.

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[3]The opinion of the Federal District Court in *Aerovias*, 197 F. Supp. 230, 236, recites that the complaints of four domestic air carriers had previously been dismissed for failure to state a cause of action on Federal grounds. Petitioner is informed that appeals were filed by those carriers but before appellate action the cases were settled in consideration of a substantial reduction in the rates.

Conclusion.

The issues posed by the Petition are of importance in the administration of the Federal Airport Act and the enforcement of the Congressional mandate that public airports developed with Federal funds be operated without unjust discrimination.

For the reasons stated in the Petition, and herein, the Petition should be granted.

November 19, 1962.

Respectfully submitted,

HUGH W. DARLING,
DONALD K. HALL,
Attorneys for Petitioner.

Of Counsel:

DARLING SHATTUCK, HALL & CALL,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 542

WESTERN AIR LINES, INC.,
Petitioner,
v.
CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

No. 542

Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District, Division One

THOMAS M. O'CONNOR,
City Attorney of the City and County of San Francisco,
WILLIAM F. BOURNE,
Public Utilities Counsel of the City and County of San Francisco,
ROBERT M. DESKY,
Deputy City Attorney of the City and County of San Francisco,
McMORRIS M. DOW,
Deputy City Attorney of the City and County of San Francisco,
206 City Hall, San Francisco 2, California,
Attorneys for Respondent.

HAROLD C. FAULKNER,
1101 Balfour Building,
351 California Street,
San Francisco 4, California,
Of Counsel.

Recorder Printing and Publishing Co., San Francisco

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In the Supreme Court

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OCTOBER TERM, 1962

No. 542

WESTERN AIR LINES, INC., *Petitioner,* v. CITY AND COUNTY OF SAN FRANCISCO, *Respondent.*	No. 542

Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District, Division One

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The opinions below are correctly described in Petitioner's writ, on page two thereof.

JURISDICTION

The certiorari jurisdiction of this Court has been invoked by Petitioner pursuant to 28 U.S.C. § 1257(3).

Respondent claims that jurisdiction is not properly invoked.

QUESTIONS PRESENTED

The case concerned rates charged Petitioner at the San Francisco International Airport which Petitioner, in its amended and supplemental answer, alleged were unjustly discriminatory in violation of Section 1110 of Title 49, United States Code (60 Stat. 176 (1946)) "and the written assurances and agreements of plaintiff given pursuant thereto to the Civil Aeronautics Administrator," and which were further alleged to be "in violation of constitutional limitations and the law of this State."[1]

The trial court, after appropriate findings of fact adverse to Petitioner's allegations, determined that the rates and charges in controversy were "fair, just and reasonable, and are not, and were not, unjustly or wrongfully discriminatory to the defendant; nor did said rates and charges * * * constitute an unjust or wrongful discrimination against, or unreasonable classification of defendant under * * * the said Municipal and County Airport Law, the Constitution of the State of California, the Charter of the City and County of San Francisco, or other statutes of the State of California, or the common law thereof, the Constitution of the United States, or the Federal Airport Act, or any other Federal Statute or administrative regulation, or under any assurances

[1] Paragraph XVI of Petitioner's amended and supplemental answer. (C.T. 23-39.)

or agreements or statement of policy made by plaintiff to the United States, or to any of its departments, agencies, or bureaus." (C.T. 61:2-23.)

The California District Court of Appeal, and by its denial of a hearing, the California Supreme Court, affirmed a factual finding and determination of the trial court that no unjust discrimination existed. The trial court (and the appellate court) further concluded, "That the assurances or agreements entered into between plaintiff and the United States, or its agencies, bureaus, or departments, under the Federal Airport Act, or any other statutory provision or administrative regulation, did not confer on defendant the right to assert any cause of action for alleged unjust discrimination by plaintiff in the ownership or operation of said airport." (C.T. 61:24-62:4.)

Under the record, the question presented, in reality, is this: Where a state trial court has concluded as a matter of fact and as a matter of law, affirmed on appeal, that no unjust discrimination existed under either the laws of the State of California or under the Federal Airport Act, does a judgment based thereon present a proper case for review by this court on writ of certiorari merely because the trial court further concluded, affirmed on appeal, that no cause of action existed under the Federal Airport Act?

Under the law of California and under the Federal Airport Act, the question is the same—was there unjust discrimination?

The state courts below, on abundant evidence, determined there was no unjust discrimination under the California law nor under the Federal Airport Act. Petitioner, oblivious of this phase of the record, seeks a

review of a superfluous holding that the Federal Airport Act did not confer on Petitioner any right thereunder to assert a cause of action for alleged unjust discrimination.

If the Federal Airport Act did confer a right to assert a cause of action for alleged unjust discrimination, the California courts have already decided that there was no unjust discrimination thereunder. This factual determination resolves the entire matter. If the Federal Airport Act did not confer a right to assert a cause of action thereunder against the City and County of San Francisco, that also should be the end of the matter.

STATUTES INVOLVED

The legal question which Petitioner seeks to present involves the entire Federal Airport Act, as well as the single section (60 Stat. 176, 49 U.S.C. § 1110) quoted by Petitioner. (Petition for Writ of Certiorari, p. 3.) Said quoted provision must be read in context (as was done by the California District Court of Appeal) with knowledge of the purposes of the entire statute.

STATEMENT OF THE CASE

The present litigation arises from a dispute over the imposition of rates and charges for aeronautical common use facilities at San Francisco International Airport (hereinafter designated "Airport"), operated by Respondent pursuant to the provisions of its Charter and the Municipal and County Airport Law of the State of California, (Cal. Stats. 1927, pp. 485-487), codified in the California Government Code as Sections 50470 through 50478 (Cal. Stats. 1949, pp. 267-268).

For the period between January 1, 1951 and August 31, 1957, Respondent brought the present action to recover the stipulated sum of $214,385.74, representing rates and charges for the use by Petitioner of the common use facilities. The Superior Court of the City and County of San Francisco determined that Respondent was entitled to retain the said sum in dispute. Petitioner appealed to the California District Court of Appeal, which affirmed said judgment and denied Petitioner's petition for rehearing. Petitioner unsuccessfully sought a hearing before the California Supreme Court.

Under the heading, "B. Facts Basing Petitioner's Claim," Petitioner sets forth its version of the facts. If Petitioner actually set forth all of the facts relating to its claim, it would be readily apparent that the trial court properly determined, as it did, there was no unjust discrimination against Petitioner under the California law or under the Federal Airport Act.

The District Court of Appeal in its opinion (Petition for Writ of Certiorari, Appendix, pp. 1-12) sets out with accuracy the factual background of the case. It would serve no good purpose to repeat it here. It is important to note that it was an agreed-to fact that the charges for the common use facilities were not excessive and were at all times reasonable.

ARGUMENT

Inappropriateness of the Granting of the Writ of Certiorari.

In reality, Petitioner seeks to have this Court review a factual determination of the California Superior Court, i.e., the non-existence of unjust discrimination under California law or the Federal Airport Act, finally affirmed on appeal by the California state courts.

In this connection, it has been well settled by this Court that granting a writ of certiorari is not warranted merely to review the evidence or inferences derived therefrom.

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178;

Cf.:

National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 502-503.

Due to its failure to establish the existence of "unjust discrimination" as a factual matter, the additional issue proposed by Petitioner, i.e., the question of whether a cause of action may be stated under the Federal Airport Act is an "academic question" inappropriate for review by certiorari.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74.

Another pertinent consideration in regard to the inappropriateness of certiorari is that the present controversy concerns rates and charges for a defined period in the past. Said controversy ended in 1957; hence, nothing in the litigation at bar presently affects Airport management, or the administration of or the allocation of aid under the Federal Airport Act.

In the absence of any need for the settlement of any pressing public issue, Respondent contends that there are neither special nor important reasons for certiorari in the present case.

Rice v. Sioux City Memorial Park Cemetery, supra,
349 U.S., at 73-74;

Layne & Bowler Corp. v. Western Well Works,
261 U.S. 387, 393;

National Labor Relations Board v. Pittsburgh Steamship Co., supra,
340 U.S., at 502;

Revised Rules of the Supreme Court of the United States,
(28 U.S.C.A.) Rule 49(1).

I

Petitioner Did Not Carry Its Burden of Proof. It Was Properly Found, as a Matter of Fact, That No Unjust Discrimination Existed.

The opinion of the California District Court of Appeal (Petition for Writ of Certiorari, Appendix, pp. 42-43) clearly establishes that the trial court made a factual determination of the nonexistence of asserted "unjust discrimination." Under decisions of this Court, a finding of the existence or nonexistence of unjust discrimination in a utility rate proceeding is a factual finding binding upon an appellate court.

Interstate Commerce Commission v. Alabama Midland Ry. Co.,
168 U.S. 144, 170;

Barringer & Co. v. United States,
319 U.S. 1, 6-7;

Pennsylvania Co. v. United States,
236 U.S. 351, 361;

Western Union Telegraph Co. v. Call Publishing Co., 181 U.S. 92, 103.

Cf.:

Postal Telegraph-Cable Co. v. Associated Press (1920), 228 N.Y. 370, 376-379, 127 N.E. 256, 258-259.

As the California District Court of Appeal in its opinion cogently observed —

> "The trial court heard and examined voluminous evidence dealing with the history of the airport, its growth and development, the purposes and objectives of long-term leases, and the rate fixing policies of the City's Public Utilities Commission. In our view, it could have properly concluded in the light of such evidence that the two classifications of users of the common facilities, which we have set out above, were reasonable and were based on material differences in the conditions and circumstances affecting each group. * * *" (Petition for Writ of Certiorari, Appendix, p. 47.)[2]

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[2] In this connection, Respondent would like to refer this Court to *Board of County Commissioners of Dade County, Florida, etc. v. Aerolineas Peruanas, S.A., et al.*, and *Board of County Commissioners of Dade County, Florida, etc., v. Lineas Aereas de Nicaragua, S.A.*, recently decided (August 31, 1962) by the United States Court of Appeals for the Fifth Circuit and numbered therein 19476 and 19632, respectively, after previous decision by the United States District Court for the Southern District of Florida, Miami Division, under the title *"Aerovias Interamericanas de Panama, S.A., et al. v. Board of County Commissioners of Dade County, Florida, etc.," (1961)*, 197 F. Supp. 230.

The decision of the Fifth Circuit concerns the analogous situation of alleged unjust discrimination asserted by certain foreign air carriers which sought recovery of rate differences due to the charging to other carriers of lower rates by reason of pre-existing contracts. The Fifth Circuit held that judgment should have been entered as a matter of law in favor of the airport authority, and observed that there is no obligation to provide the objecting airlines the same low rates as the five airlines with original contracts, which "joined with appellant to establish and sustain the airport in its infancy."

The Fifth Circuit also cited the ruling of the Administrator of Civil Aeronautics on the matter in question, which stated:

> "'The unjust discrimination provisions incorporated in grant agreements pursuant to the Federal Airport Act, in our opinion, do not require that the airport

Petitioner relies on *Western Union Telegraph Co. v. Call Publishing Co., supra,* 181 U.S. 92. In said case, this Court (181 U.S., at 103) recognized that "it was a question of fact whether, upon the differences thus shown, there was an unjust discrimination.[3] In this connection, this Court further significantly added "and questions of fact, as it has been repeatedly held, when once settled in the courts of a state, are not subject to review in this court." (181 U.S., at 103.)[4]

II

There Is No Cause of Action Created by the Federal Airport Act for the Benefit of Third Parties Upon Agreements Between the United States and Municipal Agencies, for the Payment of Grants-in-Aid for Municipal Airport Construction.

There is no conflict of decisions as postulated by Petitioner.

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owner refrain from charging users of the airport, rates higher than those to which other users of the same class are entitled under previously executed contracts which were reasonable when executed (see *Trans World Airlines, Inc. v. City and County of San Francisco*, U.S.C.A. 9th, Dec. 19, 1955, 228 F. (2d) 473, 4 Avi. 17,866, cert. den. April 30, 1956). * * *"

[3]The *Western Union case* concerned a fact situation where, under the jury instructions, the jury had to find that the discriminatory rate was an *unreasonable* one. (181 U.S., at 97-98.) Said holding is inapplicable to the situation at bar where the rate charged was concededly reasonable.

[4]The only other authorities on which Petitioner relies in connection with its assertion of unjust discrimination are *Hillsborough County Aviation Authority v. National Airlines*, 63 So.2d 61 (Fla. Sup. Ct., 1953), and *L. T. Barringer v. United States, supra*, 319 U.S. 1.

The *Hillsborough case* does not assist Petitioner, since it does not concern unjust discrimination under the Federal Airport Act (60 Stat. 176, 49 U.S.C. § 1110), and holds that a right conferred on an airline to an exclusive sign location on a hangar building on terms which are "fair and reasonable" will not amount to "unjust discrimination" under a "no 'exclusive right' of use" provision of the Civil Aeronautics Act of 1938. (63 So.2d at 63-64. Nothing in the *Hillsborough case* suggests that justification for airport rates and charges must depend solely upon a consideration of the common use facilities which are furnished, rather than of all facts and circumstances of the airport operation.

Similarly, the *Barringer case* does not support Petitioner's position for the reasons explained in the opinion of the California District Court of Appeal, i.e., that there were *dissimilar circumstances* distinguishing the use of the Airport by United and TWA from that by Petitioner and other airlines similarly situated. (Petition for Writ of Certiorari, Appendix, pp. 47-51.) Indeed, as the *Barringer case* itself recognizes, even under the Interstate Commerce Act, differences in rates may be justified on the basis of dissimilar circumstances, including the necessity of meeting changing competitive conditions. (319 U.S., at 6-8.)

While Petitioner relies on *Northeast Airlines, Inc. v. Weiss,* 113 So.2d 884 (District Court of Appeal of Florida, Third Dist. 1959), certiorari denied by the Florida Supreme Court, 116 So.2d 772, as creating such a conflict, the decision of the intermediate state appellate court in the *Weiss case* is fully and completely distinguished by the California District Court of Appeal (Petitioner for Writ of Certiorari, Appendix, pp. 19-21) as determining only the issues (which are not involved in this case) of the exhaustion of administrative remedies and applicability of the doctrine of primary jurisdiction.

The *Weiss case* contains no holding, nor does it examine the question, as to whether the Federal Airport Act creates a third party cause of action. On the contrary, the decision of the California District Court of Appeal that no such cause of action exists, is in accordance with the opinion of the United States District Court for the Southern District of Florida in *Aerovias Interamericanas de Panama, S.A., et al. v. Board of County Commissioners of Dade County, Florida, etc.* (1961), 197 F. Supp. 230, at 236 (reversed on other grounds in cases cited footnote 2, *supra*), holding that the Federal Airport Act (as well as other statutes) did not empower airlines to sue as third parties on grant-in-aid agreements between a municipality operating an airport and the United States Government. (See California District Court of Appeal opinion, Petition for Writ of Certiorari, Appendix, p. 21, footnote 11.)

On the merits, the California District Court of Appeal correctly determined that nothing in the Federal Airport Act, in the assurances given thereunder, or in other assurances, intended to confer on any third party

a cause of action to recover assertedly discriminatory airport rates and charges.[5] This construction is in accordance with decisions of this Court under other statutes.

T.I.M.E. v. United States,
359 U.S. 464, 468-471;

Nashville Milk Co. v. Carnation Co.,
355 U.S. 373, 377-379.

As the California District Court of Appeal explained, the Federal Airport Act of 1946 is not to be construed as a regulatory statute, but rather as an enactment to secure cooperative federal and municipal co-sponsorship of a nationwide program for the construction of adequate local airport facilities, with the provision of limited remedies on the part of the Administrator to assure the carrying out of said purposes. (See California District Court of Appeal opinion, Petition for Writ of Certiorari, Appendix, pp. 16-18; see, particularly, legislative history recited in footnote 10 of the Appendix, pp. 16-17.)

It therefore correctly determined that construction of the Act to provide an additional private remedy would not further the basic objectives of the statute and would not be in accord with congressional intent.

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[5] It should be noted, as stated by this Court in *De Sylva v. Ballentine*, 351 U.S. 570, at 580, that "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law." Accord: *Reconstruction Finance Corp. v. County of Beaver*, 328 U.S. 204, 210; *Hayes v. Seaton*, 270 F.2d 319, 324-325 (106 App. D.C. 126, 131-132) cert. den. 364 U.S. 814; rehearing den. 364 U.S. 906.

Respondent suggests that pursuant to this principle, California state courts could properly review and determine the existence of third party beneficiary rights under the terms of the grant-in-aid agreements as a matter of state law governing construction of contracts.

In this matter, the state courts examined the question of the existence of the cause of action both from a federal and a state standpoint. (Petition for Writ of Certiorari, Appendix, pp. 17-26.)

CONCLUSION

In view of the factual nature of the question sought to be reviewed and the correctness of their determination by the state courts, Petitioner does not present a substantial federal question.

It is therefore respectfully urged that the petition for a writ of certiorari be denied.

DATED: San Francisco, California, November 13, 1962.

Respectfully submitted,

THOMAS M. O'CONNOR,
City Attorney of the City and County of San Francisco,

WILLIAM F. BOURNE,
Public Utilities Counsel of the City and County of San Francisco,

ROBERT M. DESKY,
Deputy City Attorney of the City and County of San Francisco,

McMORRIS M. DOW,
Deputy City Attorney of the City and County of San Francisco,

Attorneys for Petitioner.

HAROLD C. FAULKNER,
Of Counsel.